CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 157

COMMONWEALTH OF MASSACHUSETTS, et al
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 27, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1945.

No. 4193.

COMMONWEALTH OF MASSACHUSETTS ET AL.,

APPELLANTS,

v.

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLEE.

No. 4209.

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS ET AL.,

APPELLEES.

CROSS APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (WYZANSKI, J.), MAY 24, 1946.

TRANSCRIPT OF RECORD.

EDMUND J. BRANDON, UNITED STATES ATTORNEY,
GEORGE F. GARRITY, ASSISTANT U. S. ATTORNEY,
for UNITED STATES OF AMERICA.

CLARENCE A. BARNES, ATTORNEY GENERAL, MASS.,
ALFRED E. LoPRESTI, ASSISTANT ATTORNEY GENERAL,
JOHN A. BRENNAN,
for COMMONWEALTH OF MASSACHUSETTS ET AL.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1945.

No. 4193.

COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,
v.
UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE.

No. 4209.

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLANT,
v.
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLEES.

TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 3671, CIVIL ACTION.

UNITED STATES OF AMERICA,
Plaintiff,
v.
CARLTON W. SPENCER ET INTERVENER,
Defendants.

APPEAL OF DEFENDANT, CARLTON W. SPENCER AND OF INTERVENER COMMONWEALTH OF MASSACHUSETTS, AND OF PLAINTIFF UNITED STATES OF AMERICA FROM JUDGMENT ENTERED MAY 24, 1946.

The Complaint in this cause was filed on April 30, 1945; was duly entered at the March Term, 1945, of this court and is as follows:

COMPLAINT.

[Filed April 30, 1945.]

The plaintiff, by Edmund J. Brandon, United States Attorney, and Thomas P. O'Connor, Assistant United States Attorney, brings this complaint and avers as follows:

I. This is an action of a civil nature, arising under the laws providing for internal revenue, to establish and enforce the personal liability of the defendant for a debt due the plaintiff for taxes, as hereinafter set forth. The action is commenced under the authority and sanction of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

II. The defendant, who resides within the District of Massachusetts, was, at the time of the acts herein complained of, assignee under a voluntary assignment for the benefit of creditors by Somerville Sales & Service, Inc., a corporation organized, and now or formerly existing, under the laws of the Commonwealth of Massachusetts, with a principal place of business within said District, and having been, at the time of the acts herein complained of, a debtor corporation not having sufficient property to pay all its debts.

III. The Commissioner of Internal Revenue assessed taxes against the corporation, the liability for which was incurred within the District of Massachusetts, as follows:

Type of Tax	Period	Tax		
(1) Federal Insurance Contributions Act (Title VIII)	1st Quarter 1938	Tax	$179.49	
		Penalty	26.92	
		Interest	2.69	
				$209.10
(2) "	2nd Quarter 1938	Tax		196.87
(3) "	3rd Quarter 1938	Tax	$122.51	
		Penalty	18.38	
		Interest	2.65	
				143.54
(4) "	4th Quarter 1938	Tax	$112.91	
		Penalty	5.65	
		Interest	1.32	
				119.88
(5) "	1st Quarter 1939	Tax		20.66
(6) Federal Unemployment Tax Act (Title IX)	1938	Tax	$917.22	
		Penalty	45.86	
				963.08
(7) Capital Stock	1939	Tax		21.00
		Grand Total		$1,674.13
		Paid		331.39*
		Balance Due		$1,342.74

*(This amount was applied to Federal Insurance Contributions taxes.)

IV. On some date, unknown to the plaintiff, subsequent to the date the tax liability was incurred and prior to March 29, 1939,

the corporation made a voluntary assignment for the benefit of creditors to the defendant, who thereafter came into possession of certain assets of the corporation which he converted into cash in the total amount, including also cash acquired from the corporation, of $1,135.11.

V. Proofs of claim, original and amended, were filed by the Collector of Internal Revenue with the defendant, as assignee, on March 29, 1939, May 13, 1939, June 12, 1939, and May 8, 1940, this last proof of claim being in the amount of $1,801.46.

VI. On or about October 6, 1939, all of the above-mentioned cash was disbursed by the defendant as follows: $803.72 was paid to the Massachusetts Division of Unemployment Compensation and the balance of $331.39 was paid to the Collector of Internal Revenue, leaving a balance of $1,342.74 due the plaintiff for taxes, including interest figured to on or about the respective dates of assessments.

VII. Section 3466 of the Revised Statutes (U.S.C. 1940 ed., Title 31, Section 191) provides that in cases of this kind debts due the United States shall be first satisfied. Section 3467, as amended by Section 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U.S.C. 1940 ed., Title 31, Sec. 192), provides that if certain named fiduciaries, including assignees, pay other debts before satisfying claims of the United States, such fiduciaries shall be personally liable, to the extent of such payments, for the debts so due the United States. The defendant is, therefore, personally liable to the plaintiff in the amount of $803.72, the same being the amount of the payment by him on a debt other than the debt to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant for the said sum of $803.72, interest, and costs.

EDMUND J. BRANDON,
United States Attorney,
Attorney for Plaintiff.

THOMAS P. O'CONNOR,
Assistant United States Attorney.
11th Floor, Federal Building, Boston, Massachusetts.

[MEMORANDUM: The following Motion to Amend the Complaint was introduced and allowed at the trial:]

PLAINTIFF'S MOTION TO AMEND COMPLAINT.

The plaintiff moves to amend the complaint, heretofore filed, by striking out paragraph III thereof and by substituting therefor the following:

Type of Tax	Period			
(1) Social Security Act (Title VIII)	1st Quarter 1938	Tax	$179.49	
		Penalty	26.92	
		Interest	2.69	
				$209.10
(2) "	2nd Quarter 1938	Tax		196.87
(3) "	3rd Quarter 1938	Tax	$122.51	
		Penalty	18.38	
		Interest	2.65	
				143.54
(4) "	4th Quarter 1938	Tax	$112.91	
		Penalty	5.65	
		Interest	1.32	
				119.88
(5) "	1st Quarter 1939	Tax		20.66
(6) Social Security Act (Title IX)	1938	Tax	$917.22	
		Penalty	45.86	
				963.08
(7) Capital Stock	1939	Tax		21.00
		Grand Total	.....	$1,674.13
		Paid	.....	331.39*
		Balance Due	.....	$1,342.74

*(This amount was applied to the Social Security Act taxes under Title VIII.)

EDMUND J. BRANDON,
United States Attorney,
Attorney for Plaintiff.

GEORGE F. GARRITY,
Assistant United States Attorney.

Assented to:

FRANK C. HESSION,
Counsel for the Defendant.

JOHN A. BRENNAN,
Counsel for the Intervener.

Allowed 4/3/46.
CHARLES E. WYZANSKI, JR.,
U.S.D.J.

During the same term, on May 16, 1945, the following Answer was filed:

ANSWER OF DEFENDANT.

[Filed May 16, 1945.]

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 1 of the complaint.

2. The defendant admits the allegations of paragraph 2 of the complaint.

3. The defendant admits the allegations of paragraph 3 of the complaint.

4. The defendant admits that subsequent to the date of the tax liability referred to in paragraph 3 of the complaint and prior to March 29, 1939, Somerville Sales and Service, Inc., made a voluntary assignment for the benefit of creditors to the defendant. The defendant admits the other allegations in paragraph 4.

5. The defendant admits the allegations of paragraph 5.

6. The defendant admits that on October 6, 1939, $803.72 was paid to the Massachusetts Division of Unemployment Compensation, and $331.39 was paid to the Collector of Internal Revenue. The defendant denies the other allegations of paragraph 6.

7. The defendant denies the allegations of paragraph 7.

8. And further answering, the defendant says that the payments made by the defendant, set forth in paragraph 6 of the complaint, were made pursuant to an agreement made by the plaintiff, the Massachusetts Division of Unemployment Compensation and the defendant, and that said payment in the sum of $803.72, made October 6, 1939, to the Massachusetts Division of Unemployment Compensation, was made with the full knowledge and approval of the plaintiff upon agreement on the part of said Massachusetts Di-

vision of Unemployment Compensation to pay said sum to the plaintiff if it should be determined as matter of law that said payment should have been made to the plaintiff. The defendant says that the plaintiff is estopped in equity and good conscience from prosecuting any claim against him.

Wherefore, the defendant prays that the complaint be dismissed and for his costs.

By his attorney,

FRANK C. HESSION.
30 State Street, Boston, Mass.

CERTIFICATE OF SERVICE.

I, Frank C. Hession, attorney for the defendant, hereby certify that I have served a copy of the foregoing answer upon Edmund J. Brandon, Esquire, United States Attorney, counsel of record for the plaintiff, by mailing a letter, postage prepaid, containing a copy of the above answer to Edmund J. Brandon, Esquire, Federal Building, Boston, Massachusetts, May 15, 1945.

FRANK C. HESSION.

During the same term, on June 14, 1945, the following Motion to Intervene was filed:

MOTION TO INTERVENE.

[Filed June 14, 1945.]

The Commonwealth of Massachusetts, Division of Employment Security, moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that the United States government and the Commonwealth of Massachusetts are in a Federal-State plan to relieve unemployment, and the payment of $803.72 made by the defendant, Carlton W. Spencer, was a proper payment to the Commonwealth of Massachusetts both in fact and in law by virtue of the provisions of Sec. 902 (a) (1) of the Social Security Act as amended by H. R. 6635, 76th Congress, 1st Session, and as such has a defense to plaintiff's claim

presenting both questions of law and of fact which are common to the main action, and the representation of the applicant's interest by the existing parties is inadequate and the applicant may be bound by a judgment in the action.

JOSEPH J. LEONARD,
Designee of Attorney General,
JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Applicant for Intervention.
881 Commonwealth Avenue, Boston, Massachusetts.

June 25, 1945, SWEENEY, J.

Hearing. Motion allowed, no one appearing to oppose, Mr. Garrity, Assistant United States Attorney, not objecting thereto.

By the Court,

JOSEPH J. DUWAN,
Deputy Clerk.

NOTICE OF MOTION.

To: EDMUND J. BRANDON, United States Attorney, Department of Justice,
Post Office Building, Boston Massachusetts:

CARLTON W. SPENCER,
30 State Street, Boston, Massachusetts:

Please take notice that the undersigned will bring this motion before this court at Room 6, Post Office Building, in the City of Boston, on the twenty-fifth day of June 1945, at 2 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

JOSEPH J. LEONARD,
Designee of Attorney General,

JOHN A. BRENNAN,
Designee of Attorney General, Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Applicant for Intervention.

During the same term, on June 25, 1945, the above cause came on for hearing upon the motion to intervene, the Honorable George C. Sweeney, United States District Judge sitting, and after full hearing was allowed as appears endorsed thereon.

On the same day after the motion to intervene had been allowed the intervener filed the following Answer:

INTERVENER'S ANSWER.
[Filed June 25, 1945.]

1. The intervener is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph I of the complaint.

2. The intervener admits that the defendant, Carlton W. Spencer, who resides within the District of Massachusetts, was, at the time of the acts herein complained of, assignee under a voluntary assignment for the benefit of creditors by Somerville Sales & Service, Inc., a corporation organized, and now or formerly existing, under the laws of the Commonwealth of Massachusetts, with a principal place of business within said District. The intervener is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph II.

3. The intervener is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph III of the complaint.

4. The intervener admits, that on some date subsequent to the date the tax liability was incurred and prior to March 29, 1939, the corporation made a voluntary assignment for the benefit of creditors to the defendant, Carlton W. Spencer. The intervener is without knowledge or information sufficient to form a belief as

to the truth of the other averments of paragraph IV of the complaint.

5. The intervener is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph V of the complaint.

6. The intervener admits that on October 6, 1939, $803.72 was paid to the Massachusetts Division of Unemployment Compensation (now the Massachusetts Division of Employment Security). The intervener is without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph VI of the complaint.

7. The intervener denies the allegations of paragraph VII of the complaint.

8. And further answering, the intervener says that the payment of $803.72 by the defendant, Carlton W. Spencer, as set forth in part in paragraph VI of the complaint, was made pursuant to an agreement between the plaintiff, the defendant, and the intervener, and that said payment was made with the full knowledge and approval of the plaintiff upon an agreement on the part of the intervener to pay said sum to the plaintiff if it should be determined as a matter of law that said payment should have been made to the plaintiff.

9. And further answering, the intervener says that for the years 1936, 1937, 1938 and 1939, which include the taxable period here in question, Somerville Sales & Service, Inc. was an employer subject to Mass. G. L. Ch. 151A, the Employment Security Law, which is a counterpart of the federal Social Security Act.

10. And further answering, the intervener says that the payment of $803.72 referred to in paragraph VI of the complaint and paid to the Commonwealth of Massachusetts by the defendant, Carlton W. Spencer, was in accordance with the provisions of the Social Security Act as amended, and Mass. G. L. Ch. 151A, the Employment Security Law. The said Social Security Act as amended and as now contained in U. S. C. A. Title 26, Internal Revenue Code, Chap. 9, Subchap. C, Sec. 1600, imposes a tax of 3 per cent on em-

ployers of eight or more individuals, and under the provisions of Sec. 1601 (a) (1), an employer who pays into a state unemployment compensation fund may receive credit therefor up to 90 per cent of the federal tax imposed upon the employer by Sec. 1600. Under Sec. 1601 (a) (3) the time for receiving credit against the federal tax was extended beyond the time provided in Sec. 1604 for the filing of the return required from the employer by the Commissioner of Internal Revenue.

11. An further answering, the intervener says that in the instant case the payment of $803.72 to the Commonwealth of Massachusetts on October 6, 1939 was paid in accordance with amendments to the Social Security Act for the year 1939, which extended the time in which an employer could make payment of his unemployment tax to the state and still receive credit against the tax due to the federal government. Sec. 902 (a) (1) of the Social Security Act Amendments of 1939 permitted this defendant, Carlton W. Spencer, to make payment to the state before the sixtieth day after the enactment of these Social Security Act Amendments and thereby receive credit for said payment against the federal tax.

12. And further answering, the intervener says that this payment to the state, and the federal credit applicable therefor, was regulated by an Act of Congress August 10, 1939 and which is contained in U. S. C. A. Title 42, The Public Health and Welfare, Chap. 7, Subchap. IX, Sec. 1102 under "Historical Note" which provides as follows:

> "Credits and Social Security Tax. Act August 10, 1939, c. 666, Title IX, sec. 902 (a) (b) (c) (d) and (h), 53 Stat. 1399, provided as follows:
>
> "'(a) Against the tax imposed by section 901 of the Social Security Act (section 1101 of Title 42) for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State Law —
>
> "'(1) Before the sixtieth day after the date of the enactment of this Act; * * *'."

The defendant in this complaint having paid to the Commonwealth of Massachusetts the sum of $803.72 on October 6, 1939, which was within the period provided by the amendment hereinafter referred to, said sixty-day period having expired on the ninth day of October 1939, has complied with both the federal and the state law, and this payment has been properly paid to the Commonwealth of Massachusetts under the Social Security Law as amended and has satisfied the debt due the plaintiff.

13. And further answering, the intervener says that additional clarifying amendments were enacted by Congress in 1941 and 1943 which enabled a taxpayer to obtain credit under the Social Security Act against the federal tax as originally provided under Sec. 901 of the Social Security Act, irrespective of the date of payment.

Wherefore, the intervener prays that the complaint be dismissed and the sum of $803.72 which was paid by the defendant, Carlton W. Spencer, to the Massachusetts Division of Employment Security, and which has been deposited in the unemployment trust fund in the United States Treasury to the credit of the Commonwealth of Massachusetts, be retained by the intervener in the unemployment compensation fund of the Commonwealth of Massachusetts.

JOSEPH J. LEONARD,
Designee of Attorney General,

JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Intervener.

The cause was then continued from term to term to the March Term, 1946, when on April 3, 1946, the above cause came on for trial without jury upon stipulation and an agreed statement of facts the Honorable Charles E. Wyzanski, Jr., United States District Judge sitting, and after full hearing was taken under advisement.

During the same term on May 2, 1946, the parties filed an amendment to the agreed statement of facts and stipulation as per suggestion of the court at the time of the trial.

[MEMORANDUM: The amendment to the agreed statement of facts and stipulation referred to above being printed at page 21 of this record is here omitted.]

On the same day the court announced its opinion in which it ordered judgment for the defendant.

During the same term, on May 24, 1946, the following Judgment was entered:

JUDGMENT.

May 24, 1946.

WYZANSKI, J. In accordance with the opinion handed down in the above-entitled cause, it is ordered

Judgment for the plaintiff in the sum of six hundred and ten dollars and twenty-seven cents ($610.27) without interest and costs.

By the Court,

HELEN I. TWEEDY,
Deputy Clerk.

Entered: May 24, 1946.

CHARLES E. WYZANSKI, JR.,
United States District Judge.

From the foregoing judgment, on May 24, 1946, the defendant and intervener filed a notice of appeal to the United States Circuit Court of Appeals for the First Circuit. On the same day the defendant and intervener filed the required bond for costs on appeal, the Maryland Casualty Company acting as surety.

On August 19, 1946, the plaintiff filed a notice of appeal to the United States Circuit Court of Appeals for the First Circuit from the foregoing judgment.

OPINION.

May 2, 1946.

WYZANSKI, *D. J.*

This case, tried upon an agreed statement of facts, raises one important question: when an insolvent has assets insufficient to pay his obligations both under Title IX of the Social Security Act and under an approved state unemployment compensation act, how shall his assets be distributed? The case originally presented other questions, but they are easily solved in view of the recent ruling of the Supreme Court of the United States that in the distribution of insolvent estates the claim of the United States for taxes under Title VIII of the Social Security Act has priority over the claim of a state for contributions under a state unemployment compensation act. *People of the State of Illinois, ex rel. Gordon* v. *United States,* October Term 1945, No. 749, April 22, 1946.

In the case at bar these are the facts. February 3, 1939 Somerville Sales & Service, Inc., being insolvent in the bankruptcy sense, made a common law assignment for the benefit of creditors to Spencer. The United States Commissioner of Internal Revenue thereafter assessed against the corporation $963.08 on account of the assignor's 1938 taxes under Title IX of the Social Security Act, $690.05 on account of the assignor's 1938 and 1939 taxes under Title VIII of the Social Security Act and $21 on account of the assignor's 1939 United States capital stock taxes. October 6, 1939 Spencer paid on account of the Title VIII 1938 taxes $331.39. Spencer used the remaining assets to pay $803.72 to the Commonwealth of Massachusetts on account of obligations of his assignor under the Massachusetts Unemployment Compensation Act, Mass. G. L. (Ter. Ed.) c. 151A. Of this $803.72 $775.34 represented 1938 contributions and $28.38 represented 1939 contributions. The Commonwealth has agreed to pay over this $803.72 to the United States if the payment to the Commonwealth was in disregard of the priority of the United States under R. S. § 3466. The United States has agreed that if it prevails, judgment in this case shall be limited to $803.72.

My view at the time of the argument in court was that (although the United States had not abandoned or impaired its right under R. S. § 3466 to have absolute priority with respect to the claim for $21 plus interest on account of capital stock taxes and also the claim for $690.05 plus interest less $331.39 on account of Title VIII Social Security taxes) the United States could not object to having 90 per cent of its claim to $963.08 for 1938 taxes on account of Title IX of the Social Security Act reduced by the assignee's prior payment to the Commonwealth of amounts due for the year 1938 under the Massachusetts Unemployment Compensation Act. In short I thought that the United States could recover in this case its capital stock taxes, its Title VIII taxes, and 10 per cent of its Title IX taxes, but could not recover 90 per cent of its Title IX taxes. The first part of my tentative conclusion was later supported by the authoritative ruling of the Supreme Court already cited; the second part, in my view, has not yet been settled.

At the argument of this case I inclined to regard § 902 of the Social Security Act as giving taxpayers subject to Title IX a right to discharge (up to 90 per cent of the total amounts due) their obligations to the United States by seasonable payment to approved state unemployment compensation funds (provided, of course, that the taxes and contributions covered what Congress had treated as comparable periods of employment and that the state fund had been approved). It appeared to me as though in Section 902 of the Social Security Act the Congress of the United States had in effect said that a taxpayer under Title IX had with respect to 90 per cent of the taxes due under that title an option as to the government to which he made payment. It was as though the government had imposed an obligation to pay either the government or X, and the obligee chose to satisfy the obligation by paying X. [Compare Williston, *Contracts* (2d ed.) § 781.]

The question, nicely analyzed, seemed to me to be one not of priority but of alternative obligation.

The force of that analysis seemed to me the more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, was stressed. As to 90 per cent of the taxes under that title the

objective of Congress was not to collect federal revenues but to stimulate the creation of and payment to state unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under state unemployment compensation plans.

The correctness of the foregoing reasoning seemed to me to be proved by a suppositious case. Suppose A, an insolvent, with $200 in assets, owed $100 to the United States for 1938 Title IX taxes, $90 to Massachusetts for 1938 unemployment compensation contributions and $200 to general creditors. Can it be supposed that a court that was sensitive to the principle of marshaling assets would distribute the assets so that the United States received the first $100, Massachusetts the second $90, and the general creditors $10? To do that would give the two governments more than Congress contemplated and restrict the general creditors to 5 cents on the dollar. Would not a court that was mindful of the strict legal rights of the two governments, of the policies declared in their legislation and of the rights of the general creditors to be subject to no greater priorities than those governmental rights and policies require, distribute $10 to the United States, $90 to Massachusetts, and $100 or 50 cents on the dollar to the general creditors? This would allow the two governments to receive all that they claimed from the insolvent before his insolvency and would follow the rules of priority established by R. S. § 3466.

I do not find any reason to change my views in the light of the subsequent opinion delivered by the Supreme Court of the United States in *People of the State of Illinois ex rel. Gordon* v. *United States*, October Term 1945, No. 749, April 22, 1946. An examination of the original transcript of record in that case shows that the facts in that case were these. A trustee or assignee for the benefit of creditors had in his hands $1,010.81 (R. 18 par. 5). Against these there were asserted the following claims for taxes or obligations due from the assignor: United States capital stock taxes, $58.73 plus interest; United States Title VIII, Social Security Act taxes, $1,065.52 plus interest; United States Title IX

Social Security Act taxes, $1,065.52 plus interest; and Illinois unemployment compensation contributions $721.29 plus interest (R. 2). In short, the Title VIII taxes exceeded the available funds. The Supreme Court of Illinois in its opinion held that the United States was entitled to priority on account of the $1,065.52 plus interest which represented Title VIII Social Security Act taxes (R. 50-51). It, therefore, entered judgment giving the United States priority to the entire $1,010.81 (R. 34). The appropriate Illinois state official filed in the Supreme Court of the United States a petition for certiorari which quite correctly pointed out that the only issue as to which he sought review was whether Title VIII taxes were entitled to priority over Illinois unemployment compensation contributions, — the issue as to the priority of Title IX taxes being moot. (See petition for certiorari p. 11, note; compare, "questions presented", pp. 6-7. See also petitioner's reply to brief in opposition, p. 3.) Counsel for the United States mistakenly asserted that the Illinois court had given the United States priority with respect to Title IX taxes as well as to Title VIII taxes (Br. Opp. p. 4 lines 17-20) and urged that the question presented to the Supreme Court of the United States was "whether the claim of the United States . . . for unpaid capital stock taxes, insurance contribution [Title VIII] taxes, and unemployment compensation [Title IX] taxes, is entitled to prior payment . . . over state claims . . . for unpaid unemployment compensation contributions." (Br. 2)

In support of his contention the Illinois state official urged that state unemployment compensation claims were not subject to the priority of any federal tax claim whatsoever whether it be a capital stock tax claim or a Title VIII tax claim. His view was, as stated by Mr. Justice Black, that "Congress . . . intended in effect to amend Section 3466, by making its priority provisions inapplicable to state unemployment tax claims . . . the state here urges us to treat its claim 'tantamount to a claim of the United States.'" The Illinois official did not urge (and it would have raised merely a moot question to have urged) that the United

States' Title IX claim was subject to reduction by payment to a state fund.

Mr. Justice Black answered the precise contention presented by Illinois. He ruled that the priority accorded by Section 3466 to the general class of obligations due to the United States does not apply to obligations due to the Illinois unemployment compensation fund, and that therefore the Illinois claim does not defeat the priority of the United States under Section 3466.

Mr. Justice Black had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States had not given the taxpayer the option to make payment to Illinois instead of to the United States. That, as I have said, is a problem less of priorities than of the discharge of alternative obligations and of marshaling assets. In other words, Mr. Justice Black did not specifically consider whether a possible arrangement of claims ought not to be as follows: in a definitely preferred category the claim for capital stock taxes, the claim for Title VIII taxes, and the claim for 10 per cent of Title IX taxes; and in what I can best describe as a suspended category the claim for 90 per cent of Title IX taxes and the claim for state unemployment compensation contributions, — the taxpayer or his assignee or a court charged with administration of insolvent estates having the right to elect to pay the state and defeat 90 per cent of the United States Title IX claim; but if that election is not exercised the United States to have the customary Section 3466 priority for the 90 per cent as well as the 10 per cent of its Title IX tax claim. Such a solution would not operate to give a state compensation claim a priority "tantamount to a claim of the United States" [see paragraph 5 of Mr. Justice Black's opinion]; it would merely allow a taxpayer his statutory option or alternative to discharge 90 per cent of his obligation to pay a United States Title IX tax claim by instead making payment to an approved state unemployment compensation fund.

It seems to me, as it apparently seemed to the Supreme Court of Illinois [R. 54 par. 2, *People* v. *Chicago Waste and Textile Co.*, 391 Ill. 29, 62 N.E. (2d) 537, 544, last paragraph] that that solu-

tion is the correct one. This course is not precluded by *People of the State of Illinois ex rel. Gordon* v. *United States* since on a careful analysis the issue of that possible marshaling of assets (1) was not raised by the record before the Supreme Court of the United States in that case and (2) was not considered by Mr. Justice Black in his opinion in that case.

Ordered that the Commonwealth of Massachusetts shall pay out of the $803.72 received from Spencer [1] on account of capital stock taxes, $21 together with 6% interest from the due date to the date of judgment; [2] on account of Title VIII taxes, $690.05 less $331.39 together with [a] interest on $690.05 at 6% from the due date until October 6, 1939; and [b] interest at 6% from October 6, 1939 until the date of judgment upon an amount arrived at by adding $690.05 and the interest just provided in 2 [a] and by subtracting $331.39; and [3] on account of Title IX taxes, $96.31 with interest at 6% to the date of judgment. As stipulated, the judgment will not carry interest or costs.

CHARLES E. WYZANSKI, JR.,
United States District Judge.

AGREED STATEMENT OF FACTS AND STIPULATION.

The parties to the above-entitled action agree that in paragraphs 1 to VI, inclusive, below, is a true statement of all the material facts bearing upon the issues raised in this cause, and that the case may be submitted to the court thereon.

I. This is an action of a civil nature to establish the priority of a debt due the plaintiff for taxes and to enforce the personal liability of the defendant, Carlton W. Spencer, therefor, under the provisions of Section 3466 of the Revised Statutes (U.S.C. 1940 ed., Title 31, Section 191) and Section 3467, as amended by Section 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U.S.C. 1940 ed., Title 31, Sec. 192). The action was commenced under the authority and sanction of the Commissioner of Internal

Revenue and under the direction of the Attorney General of the United States.

II. On February 3, 1939, Somerville Sales & Service, Inc., a Massachusetts corporation, and a debtor not having sufficient property to pay all its debt , made a voluntary common law assignment for the benefit of creditors to the defendant, Carlton W. Spencer, which he accepted on that date. The defendant, Carlton W. Spencer, resides within the District of Massachusetts, and this court has jurisdiction of the parties and of the subject matter.

III. The Commissioner of Internal Revenue duly and seasonably assessed against the above-named corporation taxes, penalties, and interest, as follows:

(1) Under the Social Security Act (Title IX) tax for the year 1938	$963.08
(2) Under the Social Security Act (Title VIII)	
(a) Taxes for the year 1938	669.39
(b) Taxes for the first quarter of the year 1939	20.66
(3) Capital stock tax for the year 1939	21.00
Total	$1,674.13

This amount was included in proofs of claim duly and seasonably filed by the Collector of Internal Revenue with the said defendant, as assignee. The sum of $331.39 was subsequently paid by the said defendant as hereinafter stated, and was credited by the plaintiff to item (2) (a) above, leaving balances still due, as follows;

(1) Under item (1) above	$963.08
(2) Under item (2) (a) above	338.00
Under item (2) (b) above	20.66
(3) Under item (3) above	21.00
Total	$1,342.74

together with interest according to law.

IV. The said defendant, as assignee, on or about February 3, 1939, came into possession of certain assets of said corporation which he converted into cash in the total amount, including cash acquired from the corporation, of $1,135.11.

V. The Commonwealth of Massachusetts duly and seasonably filed a claim with the said defendant, as assignee, for $803.72 for monies due in full from said corporation, Somerville Sales & Service, Inc. IV Annotated Laws of Massachusetts (Recompiled 1942) Chap. 151A.

VI. On October 6, 1939, the defendant, Carlton W. Spencer, as assignee, disbursed said cash as follows: $803.72 to the intervener, the same being the full amount of its claim, and the balance of $331.39 to the Collector of Internal Revenue, in partial satisfaction of the plaintiff's claim, leaving a balance claimed by the plaintiff in the amount of $1,342.74, with interest according to law.

VII. When the intervener accepted the said payment of $803.72 from the defendant, Carlton W. Spencer, it did so with the conviction that this constituted a payment under the Social Security Act of 1935; as amended by the Social Security Act Amendments of August 10, 1939.

VIII. It is stipulated by the parties hereto (a) that in the event the plaintiff is entitled to recover, the plaintiff abandons its claim to any sum beyond the $803.72 which represents the amount which the defendant Spencer transferred to the Commonwealth of Massachusetts; (b) that no costs or interest on the judgment shall be allowed to any party; and (c) that any such order of the court shall be appealable and nothing herein shall prejudice the right of any party hereto to appeal therefrom.

EDMUND J. BRANDON, *United States Attorney,*
by GEORGE F. GARRITY,
Assistant U. S. Attorney,

A. BARR COMSTOCK,
Special Assistant to the Attorney General,
Attorneys for the Plaintiff.

FRANK C. HESSION,
Attorney for the Defendant,
CARLTON W. SPENCER.

JOSEPH J. LEONARD,
Designee of Attorney General,
JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Intervener.

AMENDMENT TO AGREED STATEMENT OF FACTS AND STIPULATION.

[Filed May 2, 1946.]

It is agreed by the parties to the above entitled action that the agreed statement of facts and stipulation which the parties have submitted to the court may be amended in Item V so that the said Item V will read as follows:

V. The Commonwealth of Massachusetts duly and seasonably filed a claim with the said defendant, as assignee, for $803.72 for taxes and interest due in full from said corporation, Somerville Sales & Service, Inc., — IV Annotated Laws of Massachusetts (Recompiled 1942) Chap. 151A (the Massachusetts Unemployment Compensation Law) — as follows:

(1) Tax for the year 1938	$775.34
(2) Tax for the year 1939	28.38
Total	$803.72

The balance of $331.39 in the possession of the defendant, as assignee, was paid to the Collector of Internal Revenue on October 6, 1939.

EDMUND J. BRANDON, *United States Attorney,*
by GEORGE F. GARRITY,
Assistant U. S. Attorney,
Attorneys for the Plaintiff.

FRANK C. HESSION,
Attorney for the Defendant,
CARLTON W. SPENCER.
JOSEPH J. LEONARD,
Designee of Attorney General,
JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Intervener.

NOTICE OF APPEAL.

[Filed May 29, 1946.]

Notice is hereby given that Carlton W. Spencer, the defendant above named, and the Commonwealth of Massachusetts, Division of Employment Security, intervener, hereby jointly and severally appeal to the Circuit Court of Appeals for the First Circuit from the final judgment entered in this action on May 24, 1946.

CLARENCE A. BARNES,
Attorney General,
ALFRED E. LoPRESTI,
Assistant Attorney General,
Attorneys for CARLTON W. SPENCER, *Defendant, and* COMMONWEALTH OF MASSACHUSETTS, *Intervener.*

NOTICE OF APPEAL.

[Filed August 19, 1946.]

Now comes the plaintiff, the United States of America, by Edmund J. Brandon, United States Attorney for the District of Massachusetts, and serves notice that it appeals to the Circuit Court of Appeals for the First Circuit from the judgment for the plaintiff entered by this court on May 24, 1946.

EDMUND J. BRANDON,
United States Attorney,
by GEORGE F. GARRITY,
Assistant U. S. Attorney.

DESIGNATION OF CONTENTS OF RECORD.

[Filed July 3, 1946.]

Now come the defendant Carlton W. Spencer and the Commonwealth of Massachusetts, Division of Employment Security, intervener, and hereby designate the complete record and all the proceedings and evidence in the action to be contained in the record on appeal.

CLARENCE A. BARNES,
Attorney General.
ALFRED E. LoPRESTI,
Assistant Attorney General.

CERTIFICATE OF SERVICE.

I, Alfred E. LoPresti, assistant attorney general for the Commonwealth of Massachusetts, and attorney for the defendant Carlton W. Spencer, hereby certify that I have served copy of the foregoing designation of contents of record on appeal of the defendant and the Commonwealth, Division of Employment Security, upon Edmund J. Brandon, Esquire, United States Attorney, counsel of record for the plaintiff, by mailing a letter, postage prepaid, containing a copy of the above designation of contents of record on appeal to Edmund J. Brandon, Esquire, Federal Building, Boston, Massachusetts, on July 2, 1946.

ALFRED E. LoPRESTI,
Assistant Attorney General.

DESIGNATION OF CONTENTS OF RECORD.

[Filed September 19, 1946.]

Notice is hereby given pursuant to Rule 75 of the Federal Rules of Civil Procedure that the plaintiff-appellant herein designates the complete record and all the proceedings and evidence in the action to be contained in the record on appeal.

EDMUND J. BRANDON,
United States Attorney,
by GEORGE F. GARRITY,
Assistant U. S. Attorney.

CLERK'S CERTIFICATE.

I, James S. Allen, clerk of the District Court of the United States, for the District of Massachusetts, do hereby certify that the foregoing is the record on the appeals in the cause entitled:

No. 3671, CIVIL ACTION,

UNITED STATES OF AMERICA, Plaintiff,

v.

CARLTON W. SPENCER ET INTERVENER, Defendants,

in said District Court determined.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Boston, in said District, this thirtieth day of September, A.D., 1946.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM: Orders of enlargement of time for docketing cases to, and including, September 30, 1946, are here omitted.

A. I. CHARRON, *Clerk.*]

STATEMENT OF POINTS TO BE RELIED ON BY THE UNITED STATES ON ITS APPEAL.

[Filed in Circuit Court of Appeals October 2, 1946.]

The United States intends to rely on the following points on its appeal:

1. Taxes due the United States under Title IX of the Social Security Act are debts within the meaning of Section 3466 of the Revised Statutes and have priority, under that section, over unemployment taxes due a state.

2. This priority is clearly established, especially where the state has no specific and perfected lien.

3. Section 3466 should be construed liberally in favor of the United States in order to accomplish the purpose of the act, which is to secure adequate public revenue for Government requirements.

4. There is no provision in the Social Security Act or the Social Security Act Amendments of 1939 expressly amending, modifying, or making any exceptions to the broad and sweeping priority provisions of Section 3466.

5. There can be no such amendment, modification, or exception unless the intent of Congress to that effect is clearly evidenced, and no such evidence is found in any provision of either of these federal social security acts.

6. Neither of these federal acts evidences a Congressional purpose to exempt state employment taxes from the priority provisions of Section 3466, which are clearly applicable to such taxes.

7. Nothing in either of these federal acts indicates a Congressional purpose to treat a state unemployment tax as the equivalent of a federal tax, and the two are separate and distinct.

8. The underlying philosophy of the Social Security Act was to keep the state and federal systems separately administered.

9. Only the plainest inconsistency would warrant the finding of an implied exception to the operation of such a clear priority provision as that in Section 3466, or an amendment or modifica-

tion thereof, and no such inconsistency is evidenced by any subsequent act of Congress.

10. Section 3466 is not inconsistent with the express language, the implications, or the purposes of either of the federal social security acts.

11. Certain provisions of the Social Security Act indicate that Congress intended, so far as practicable, to apply to social security taxes all the remedies available to the Federal Government in collecting other taxes, and Section 3466 provides one of these remedies.

12. There is no provision, express or implied, in either of the social security acts, permitting a credit on a social security tax assessed against an insolvent corporation to be taken by an assignee for the benefit of the creditors of the corporation under a common law voluntary assignment, by reason of the payment by him of a state unemployment tax.

13. On the contrary, there is a clear implication in the Social Security Act Amendments of 1939 and the applicable Treasury Regulations that such a credit cannot be taken.

14. In the absence of an express statutory provision permitting a credit to be taken for payment by a fiduciary of a state unemployment tax, the fiduciary is obliged to pay to the Government the federal social security tax in full, and has no option to do otherwise. No such statutory provision can be found in the Social Security Amendments of 1939 or in any other Act of Congress, applying to an assignee.

15. The maximum credit allowed any fiduciary or taxpayer by the Social Security Act or the Social Security Act Amendments of 1939 is the amount of the payment on account of the state unemployment tax, this credit in no event to be greater than 90 per cent of the federal social security tax.

DOUGLAS W. McGREGOR,
Assistant Attorney General.

ANDREW D. SHARPE,
A. BARR COMSTOCK,
Special Assistants to the Attorney General.

EDMUND J. BRANDON,
United States Attorney.

GEORGE F. GARRITY,
Assistant United States Attorney.

STATEMENT OF POINTS TO BE RELIED UPON BY THE DEFENDANT, CARLTON W. SPENCER, AND THE INTERVENER, COMMONWEALTH OF MASSACHUSETTS, DIVISION OF EMPLOYMENT SECURITY.

[Filed in Circuit Court of Appeals October 4, 1946.]

1. That Section 902 of Title IX of the Social Security Act as amended gives the taxpayer the option of making payment to a State for taxes due under Section 901 of said Act and receiving 90 per cent credit therefor from the United States of America on his liability for federal excise tax imposed under Section 901 of said Act.

2. That the issue involved in this case is not one of priority, but rather one as to the right of the taxpayer to choose in the payment of one of several alternative obligations.

3. That Section 902 of the Social Security Act gives taxpayers subject to Title IX a right to discharge "up to 90 per cent of the total amounts due" for obligations to the United States of America by the seasonable payment (or within such time as authorized by amendment) to the approved State Unemployment Compensation Division.

4. That a taxpayer's liability to pay to the United States of America for federal taxes is a single responsibility even though it consists of various types of taxes.

5. That the 90 per cent credit permitted by such Section 902 of the Social Security Act is available to a taxpayer as against his liability to the United States of America for taxes of any kind.

6. That a common law assignee with reference to the payment of taxes imposed by Section 901 and with reference to the credit provision of Section 902 stands in the same position as the assignor.

7. That the amendments to the Social Security Act providing for a late payment of the tax due under Section 901 so that a taxpayer may receive credit provided for by Section 902 extend and apply to a common law assignee of an insolvent taxpayer.

8. The failure on the part of Congress to mention a common law assignee in the amendments to the Social Security Act providing for late payments for title IX taxes under Section 901 does not change or alter the common law of assignment and a common law assignee of an insolvent debtor may avail himself of the extension provided by such an amendment even though he is not specifically named in said amendments.

9. There is no priority in the order of payment for the various taxes that a taxpayer may be responsible for to the federal government.

10. That the provisions of the Social Security Act providing for payment to the State directly and for the receipt of 90 per cent credit therefor are not inconsistent with nor do they amend or repeal the provisions of Section 3466 of the United States Revised Statutes, but merely authorize the payment by the taxpayer to the State and for which a credit of 90 per cent is given.

11. Assuming that the provisions of the Social Security Act and its amendments are inconsistent with Section 3466 of the revised statutes, then to that extent Section 3466 is amended or modified thereby.

By their Attorneys,

CLARENCE A. BARNES (BY A.E.L.),
Attorney General.

ALFRED E. LoPRESTI,
Assistant Attorney General.

[fol. 29] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On February 5, 1947, these cross-appeals came on to be heard and were fully heard by the court, Honorable Armistead M. Dobie (by assignment), Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on April 2, 1947, the following opinion of the court was filed:

UNITED CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT
OCTOBER TERM, 1946

No. 4193

COMMONWEALTH OF MASSACHUSETTS et al., Appellants,

v.

UNITED STATES OF AMERICA, Plaintiff, Appellee

No. 4209

UNITED STATES OF AMERICA, Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS et al., Appellees

Cross Appeals from the District Court of the United States for the District of Massachusetts

Before Dobie, Mahoney and Woodbury, JJ.

Alfred E. LoPresti, Assistant Attorney General, Massachusetts, with whom *Clarence A. Barnes*, Attorney General, Massachusetts, and *John A. Brennan*, Chief Counsel, Division of Employment Security, were on brief, for Commonwealth of Massachusetts, Intervenor, and Carlton W. Spencer, Defendant.

Norman S. Altman, Special Assistant to the Attorney General, with whom *Sewall Key*, Acting Assistant Attorney General, *Helen R. Carloss*, Special Assistant to the Attorney General, *George F. Garrity* and *Thomas P. O'Connor* were on brief, for United States of America.

[fol. 30] OPINION OF THE COURT—April 2, 1947

MAHONEY, J:

This case is here on cross appeals from the judgment of the district court. The question involves the application of Revised Statutes § 3466 (1898),[1] 31 U.S.C. § 191 (1940), to payment of competing claims of the United States and the Commonwealth of Massachusetts against an insolvent taxpayer for unemployment compensation taxes under Title IX of the Social Security Act of 1935, 49 Stat. 620, 639 (1935), 26 U.S.C. § 1600 *et seq.* (1940), and the Massachusetts Unemployment Act. There is no dispute as to the facts which are briefly as follows: The Somerville Sales & Service, Inc., being insolvent in 1939 made a common law assignment for the benefit of creditors. The Commissioner of Internal Revenue filed with the assigne a claim against the assignor for 1938 federal unemployment compensation taxes under Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 federal insurance contributions taxes under Title VIII of said Act in the sum of $690.05, and for 1939 capital stock tax in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for state unemployment taxes under Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions for 1938 and 1939. On October 6, 1939 the assignee paid out of the sum of $1,135.11 which he had realized from the sale of the assets of the assignor $803.72 in full payment of the claim of the Commonwealth [fol. 31] of Massachusetts and the remainder of $331.39 he paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII taxes due for 1938 and

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[1] "Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

there remained unpaid the sum of $1,342.74 with interest. Massachusetts has agreed to pay over the above mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under Rev. Stat. § 3466, and the United States has agreed that if it prevails the judgment shall be limited to $803.72.

The lower court held that the United States had priority as to its capital stock taxes, its Title VIII taxes, and 10 per cent of its Title IX taxes, but that it could not recover 90 per cent of its Title IX taxes, stating that the taxpayer or his assignee had the alternative right to pay the 90 per cent of his obligation under Title IX to an approved state unemployment fund. It cited *Illinois* ex rel *Gordon* v. *United States,* 328 U.S. 8 (1946) in support of its decision as to capital stock taxes and Title VIII taxes but said that the Supreme Court had no occasion in that case to consider the problem whether as to the 90 per cent of the amount due for Title IX taxes the statute had not given the taxpayer the option of making payment to a state instead of to the United States.

Since the lower court handed down its decision in the instant case, the Supreme Court in *Illinois* ex rel *Gordon* v. *Campbell* (decided December 23, 1946) restated its position as follows:

> "*Illinois* ex rel. *Gordon* v. *United States,* 328 U.S. 8 held that in circumstances which called into application Rev. Stat. § 3466, 31 U.S.C. § 191, the claims of the United States for federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620, 636, and for federal unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat., at 639, had priority over claims of Illinois [fol. 32] for taxes under its Unemployment Compensation Act. That decision is controlling, of course, upon the same feature of this case. . . ."

Under said § 3466 it is stated that where a debtor is insolvent the debts due the United States must be paid first. There is no question but what these are debts due the United States. "The words of §3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States." *United States* v. *Waddill, Holland & Flinn, Inc.,* 323 U.S. 353, 355 (1945). It has not been decided that taxes under Title IX of the

Social Security Act are an exception which can be read into this statute and we do not think that they are. Nor do we think that §902 amended by implication said §3466. Recently the Supreme Court in *United States Department of Agriculture* v. *Redmund*, decided March 17, 1947, has said: "We reiterate what was said in *United States* v. *Emory*, 314 U.S. 423, 433: 'Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466.' "

"We agree that the social security legislation provides a method for accomplishing state and federal unemployment relief systems, integrated in plan, function, and purpose, and that sound state systems are essential to complete success of the congressional plan. But we cannot agree that Congress thereby intended in effect to amend § 3466, by making its priority provisions inapplicable to state unemployment tax claims." *Illinois* ex rel, *Gordon* v. *United States, supra*, at p. 11. There is nothing here to show any intention on the part of Congress that only 10 per cent of the taxes under Title IX of the Social Security Act should be collected by the United States from insolvents. The words of the Act do not show such intention and the court has no power to apply what it may deem [fol. 33] equitable principles in the distribution of an estate when Congress has formulated the rule that must be applied. In re *White Plains Oil Corp.*, 287 N.Y. 141, 38 N.E. (2d) 472 (1941).

The taxpayer was clearly insolvent at the time it made the assignment for the benefit of creditors. The total amount of its assets was $1135.11 and apart from all other claims filed with the assignee the claim of the United States alone amounted to $1674.13. The claim for taxes under Title IX was $963.08. The payment of Title VIII taxes and capital stock taxes would leave a balance in the hands of the assignee of only $424.06. This was clearly insufficient to pay Title IX taxes and the full amount of those taxes had to be paid before any payment could be made to the Commonwealth of Massachusetts. Under § 902 of the Act the only way in which a taxpayer may obtain a credit against Title IX taxes would be to make actual payment to a state. In this case such a payment could not be made until the United States claim was paid. By paying the United States as required under § 3466 there would be

nothing left with which to pay Massachusetts. Hence there is no way by which a credit against Title IX taxes could be obtained.

The determination by the district court that the question was one of meeting alternative obligation was error. There was no such alternative obligation here. Section 3466 commanded the payment to the United States of debts due it and therefore there was no balance left to meet any state payment with which to obtain such credit.

The judgment of the District Court is affirmed as to Title VIII taxes and capital stock taxes and is reversed as to Title IX taxes, and the case is remanded to the District Court for judgment in conformity with this opinion.

[fol. 34] On the same day, to wit, April 2, 1947, the following Judgment was entered:

JUDGMENT—April 2, 1947

This cause came on to be heard February 5, 1947, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 2, 1947, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed as to Title VIII taxes and capital stock taxes and is reversed as to Title IX taxes, and the case is remanded to the District Court for judgment in conformity with the opinion passed down this day.

By the Court, (S.) Arthur I. Charron, Clerk.

Thereafter, to wit, on April 16, 1947, mandate was stayed until further order of court.

[fol. 35] CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 34, inclusive, contain and

are a true copy of the record and all proceedings to, and including April 16, 1947, in the cross-appeals in said court numbered and entitled: No. 4193, Commonwealth of Massachusetts et al., Appellants, v. United States of America, Plaintiff, Appellee; No. 4209, United States of America, Plaintiff, Appellant, v. Commonwealth of Massachusetts et al., Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this sixteenth day of April, A. D. 1947.

Arthur I. Charron, Clerk. (Seal.)

[fol. 36] Supreme Court of the United States

Order Allowing Certiorari—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 157

Supreme Court of the United States.

OCTOBER TERM, 1947.

COMMONWEALTH OF MASSACHUSETTS ET AL.

v.

UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF MASSACHUSETTS ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

CLARENCE A. BARNES,
Attorney General,

NATHAN B. BIDWELL,
Assistant Attorney General,
For the Commonwealth
of Massachusetts.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1947.

COMMONWEALTH OF MASSACHUSETTS ET AL.

v.

UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF MASSACHUSETTS ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioners, pray that a writ of certiorari may issue to review the judgments of the Circuit Court of Appeals for the First Circuit entered April 2, 1947, in the cross-appeals between the above-named parties, docketed therein as numbered 4193 and 4209.

Opinions Below.

A memorandum opinion was filed in the District Court by Wyzanski, J., and appears at pages 13 to 17 of the record.

The opinion of the Circuit Court of Appeals appears at pages 29 to 33 of the record.

Jurisdiction.

The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended.

Question Presented.

This is a suit by the United States of America to recover from the defendant Spencer for capital stock and social security taxes owed by the defendant's assignor and raises one important question: Can the United States of America recover under United States Revised Statutes, Section 3466, from an assignee of an insolvent taxpayer for taxes due it under Title IX of the Federal Social Security Act when the assignee has made payment of said tax to a state under a federally certified state unemployment compensation act and in accordance with the provisions of Section 902 of the Federal Social Security Act as amended?

Statement.

There is no dispute as to the facts, which are briefly as follows: The Somerville Sales & Service, Inc., being insolvent, in 1939 made a common-law assignment for the benefit of creditors. The Commissioner of Internal Revenue filed with the assignee a claim against the assignor for 1938 federal unemployment compensation taxes under

Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 federal insurance contributions taxes under Title VIII of said Act in the sum of $690.05, and for 1939 capital stock in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for state unemployment taxes under Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions for 1938 and 1939. On October 6, 1939, the assignee paid out of the sum of $1135.11 which he had realized from the sale of the assets of the assignor $803.72 in full payment of the claim of the Commonwealth of Massachusetts and the remainder of $331.39 he paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII taxes due for 1938 and there remained unpaid the sum of $1342.74 with interest. Massachusetts has agreed to pay over the above-mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under Revised Statutes, Section 3466, and the United States has agreed that if it prevails the judgment shall be limited to $803.72.

The lower Court held that the United States had priority as to its capital stock taxes, its Title VIII taxes, and 10 per cent of its Title IX taxes, but that it could not recover 90 per cent of its Title IX taxes, stating that the taxpayer or his assignee had the alternative right to pay the 90 per cent of his obligation under Title IX to an approved state unemployment fund.

From the finding of the lower Court both parties appealed. The Circuit Court of Appeals affirmed the judgment of the lower Court as to Title VIII taxes and capital stock taxes and reversed same as to Title IX taxes. The effect of the decision of the Circuit Court of Appeals was to give full priority to the United States of America for all of these taxes.

From the decision of the Circuit Court of Appeals with reference to both appeals the petitioner now seeks relief in this Court.

Specification of Errors.

The Circuit Court of Appeals erred in holding that the defendant Spencer as assignee of the taxpayer did not have the right to exercise the option given to a taxpayer under Section 902 of the Social Security Act to pay the Commonwealth of Massachusetts towards the liability of the taxpayer under an approved state unemployment act, and receiving credit therefrom towards the taxpayer's liability to pay any federal tax to the United States of America.

Reasons for Granting the Writ.

The principal reasons for the granting of this writ are that the exact question raised in this case has never been passed upon by the Supreme Court of the United States and that a decision is desirable as a precedent and authority for all states having approved unemployment acts.

Respectfully submitted,

CLARENCE A. BARNES,
Attorney General,

NATHAN B. BIDWELL,
Assistant Attorney General.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

It is respectfully submitted that Section 902 of the Social Security Act as amended, permitting credit to a taxpayer for the payment of the liability imposed by Section 901, does not contradict or repeal the provisions of Section 3466 of the United States Revised Statutes.

Section 902 as amended creates a situation in which the taxpayer or his assignee has the option of doing one or two things: He can pay the United States Government directly, pursuant to the provisions of Section 901, or he may elect to pay the state government and exercise his option of receiving the credit provided for by Section 902. The exercise of this option by an assignee of the taxpayer is not in violation of Section 3466 of the United States Revised Statutes, since the payment is made to the state with the consent of the federal government and at its express invitation. Even if it be assumed that the provisions of Section 902 as amended are in conflict with Section 3466 of the United States Revised Statutes, it is submitted that, since Section 902 of the Social Security Act is the later enactment of Congress, it would amend, modify or even repeal such provisions of Section 3466 as were inconsistent or in conflict with Section 902.

The United States Supreme Court has considered the question of priority of taxes due the federal government under Title VIII as against taxes due to a state under an approved unemployment compensation act. This question was considered in *People of State of Illinois, ex rel. Gordon,* v. *United States,* 66 S. Ct. 841, where it was held that Section 3466 gave a priority to the federal government for taxes due under Title VIII as against the claim of a state for taxes under its unemployment compensation act.

The case at bar, however, is distinguishable from the Gordon case in that the taxpayer (through his assignee) is the person who is seeking the credit provided for by Section 902 as amended. It is respectfully submitted that the Gordon case is not decisive or controlling in the case at bar, since the case at bar does not raise a question of priority between the United States and the Commonwealth of Massachusetts, but is one which maintains the right of the taxpayer to pay directly to the state by virtue of authority granted to him by federal law.

The language of Section 902 as amended specifically states that the "taxpayer shall be allowed credit for the amount of contributions" paid into an unemployment fund under a state law. There is no reference or language of any kind indicating that this credit can be taken by a state. Recognition of the credit provision on behalf of the taxpayer as against the taxes due the federal government is consistent with the indicated purposes of the Social Security Act.

Steward Machine Company v. *Davis*, 301 U.S. 548.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals for the First Circuit.

CLARENCE A. BARNES,
Attorney General,

NATHAN B. BIDWELL,
Assistant Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 157.

COMMONWEALTH OF MASSACHUSETTS ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR CARLTON W. SPENCER AND THE COMMONWEALTH OF MASSACHUSETTS.

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BRIEF FOR CARLTON W. SPENCER AND THE COMMONWEALTH OF MASSACHUSETTS.

I. The Opinions Below.

The opinion of the District Court of the United States for the District of Massachusetts, entered on May 1, 1946, is officially reported at 65 F. Supp. 763 (R. pp. 13-18).

The opinion of the Circuit Court of Appeals for the First Circuit, entered on April 2, 1947, is officially reported at 160 F. (2d) 614 (R. pp. 29-34).

II. Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U.S.C. 347), as amended.

III. Statement of the Case.

In the case at bar the facts are as follows: February 3, 1939, Somerville Sales and Service, Inc., being insolvent in the bankruptcy sense, made a common-law assignment for the benefit of creditors to Spencer. The United States Commissioner of Internal Revenue thereafter assessed against the corporation $963.08 on account of the assignor's 1938 taxes under Title IX of the Social Security Act, $690.05 on account of the assignor's 1938 and 1939 taxes under Title VIII of the Social Security Act and $21 on account of the assignor's 1939 United States capital stock taxes. The Commonwealth of Massachusetts duly and seasonably filed a claim with the defendant, as assignee, for $803.72 for unemployment taxes due from the assignor under the Massachusetts Unemployment Compensation Act, Mass. G.L. (Ter. Ed.) Chapter 151A (Annotated Laws of Massachusetts, Chapter 151A, Recompiled 1942). On October 6, 1939, Spencer paid $803.72 to the Commonwealth of Massachusetts on account of obligations of his assignor under the Massachusetts Unemployment Compensation Act. Of this amount, $775.34 represented 1938 contributions and $28.38 represented 1939 contributions. Spencer paid the remaining assets of $331.39 to the Collector of Internal Revenue on account of Title VIII, Title IX and capital stock taxes assessed by the United States Commissioner of Internal Revenue. This $331.39 was applied by the Collector of Internal Revenue on account of the assignor's taxes under Title VIII of the Social Security Act. The Commonwealth has agreed to pay over to the United States the amount of $803.72 which was paid to the Commonwealth by Spencer, if this payment was in disregard of U.S. Revised Statutes, Section 3466. The United States has agreed that, if it prevails, judgment in this case shall be limited to $803.72.

On these facts, the District Court, on May 1, 1946, held that the United States had priority for the full amount of its capital stock and Title VIII taxes and for 10 per cent of Title IX taxes, but that it could not recover the remaining 90 per cent of said tax, on the ground that the taxpayer or his assignee had the alternative right to pay 90 per cent of his obligation under Title IX to an approved State unemployment fund (65 F. Supp. 763) (R. p. 38).

On appeal and cross-appeal, the Circuit Court of Appeals for the First Circuit, on April 2, 1947, affirmed the judgment of the District Court as to capital stock and Title VIII taxes but reversed said judgment as to Title IX taxes, holding, in substance, that the taxpayer's assignee had no right to pay any part of the Title IX taxes to a State unemployment fund and that the United States had priority, under R. S. 3466, for the *full* amount of capital stock taxes, Title VIII taxes *and* Title IX taxes (160 F. (2d) 614) (R. p. 33).

IV. Issue.

Where a taxpayer owing Federal capital stock, Title VIII, Title IX, and other Federal taxes and State unemployment taxes becomes insolvent and makes an assignment for the benefit of his creditors, and his assignee has available as funds of the taxpayer a sum of money which is less than 90 per cent of the amount of Title IX taxes, may the assignee make payment of the State unemployment tax to the exclusion of the Federal Government claim for Title IX taxes or any other taxes due the Federal Government from the taxpayer?

V. Applicable Statutes.

Social Security Act of August 14, 1935, Title IX, Section 901 and Section 902 (U.S. Code, 1940 ed., Title 42, Chapter 7, Subchapter IX, Sections 1101, 1102). These sections are now incorporated in and superseded by Sections 1600 and 1601(a) of the Internal Revenue Code of 1939 and Supplement I thereto:

"Sec. 901. Imposition of tax.

"On and after January 1, 1936, every employer (as defined in section 907 of this title) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907 of this title) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907 of this chapter) during such calendar year:

"(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

"(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

"(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (Aug. 14, 1935, ch. 531, Title IX, § 901, 49 Stat. 639.)"

"Sec. 902. Credit against tax.

"The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment

funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903."

Social Security Act Amendments of 1939, Title IX, Section 902(a)(1), approved August 10, 1939:

"Sec. 902 (a). Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

"(1) Before the sixtieth day after the date of the enactment of this act . . ."

Revenue Act of 1938, Section 810(a), effective May 28, 1938; Second Revenue Act of 1940, Section 701(a), approved October 8, 1940; Revenue Act of 1941, Section 701(a), approved September 20, 1941; Revenue Act of 1943, Section 601, passed February 25, 1944:

"Sec. 601. Credits against Federal Unemployment Taxes.—(a) Section 1601 (a) (3) (relating to the time within which contributions are required to be paid in order to be allowable as credit) is amended to read as follows:

"(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 1604 to file a return for such year; except that credit shall be permitted for contributions

paid after such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day."

U.S. Revised Statutes, Section 3466, Act of March 3, 1797 (U.S. Code, 1940 ed., Title 31, Section 191):

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Massachusetts State Unemployment Law, General Laws (Ter. Ed.) Chapter 151A, as amended.

VI. Argument.*

Any discussion of this subject must take cognizance of the history and operation of this social legislation which clearly indicates the close integration and inter-relationships between the Federal and State measures to combat the evils of unemployment.

*The history of unemployment insurance legislation, consideration of related Federal statutes and argument in the brief filed by the State of Illinois, as *amicus curiae* in this action, are so capably presented that a considerable part thereof is reproduced herein. Due acknowledgment of the use thereof is hereby made.

The critical conditions which give rise to a national program of unemployment insurance have been graphically described by this Court in *Steward Machine Company* v. *Davis*, 301 U.S. 548, which involved the constitutionality of Title IX, where this Court, at pages 586-588, declared:

> ". . . there is no need to remind ourselves of facts as to the problem of unemployment . . . During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. . . . The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66, *Helvering* v. *Davis*, decided herewith, *post*, p. 619. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states . . . incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government ex-

pended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. . . . in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation."

In *Helvering* v. *Davis*, 301 U.S. 619, which involved an attack upon the constitutionality of Titles II and VIII of the Social Security Act (Old Age Benefits), this Court, at page 641, stated:

". . . The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra*, has set the doubt at rest. . . ."

The national scope of the problem of unemployment was stressed by the President of the United States in his message to Congress on June 8, 1934,[1] wherein he declared:

"We are compelled to employ the active interests of the nation as a whole through government in order

[1] Cong. Rec., Vol. 78, Pt. 10, p. 10770.

> to encourage a greater security for each individual who composes it. . . . If, as our Constitution tells us, the Federal government was established, among other things, 'to promote the general welfare' it is our plain duty to provide for that security upon which welfare depends. . . ."

Both branches of Congress emphasized that unemployment relief posed the most serious question for the nation.[2]

It was a problem, nation-wide in scope, which could not be combated by the States acting individually. Moreover, most States were reluctant to enact unemployment compensation legislation for fear of imposing the additional burden of taxation entailed upon their already depressed industries, thus placing their industries at a disadvantage in competing with industries of States which had no such legislation.

To cope with the problem of unemployment, Congress enacted Titles III, VII and IX of the Social Security Act.[3] Briefly, Title IX levied a uniform payroll tax on employers of eight or more throughout the nation. *The Federal statute*, however, is not of itself a complete unemployment compensation law; it provides payroll taxes but *makes no provision for the payment of unemployment compensation to unemployed workers, leaving that function to the States.*

It is obvious that a mere plan for taxation would not solve the problem which faced Congress and the nation. The heart of any plan to remedy the evil of unemployment is the stabilization of employment and *the payments of benefits to unemployed workers to cushion and thereby*

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[2] Senate Report No. 628, 74th Congress, 1st Session, p. 10; House Report No. 615, 74th Congress, 1st Session, p. 7.

[3] Chapter 531, 49 Stat. 620.

prevent the cumulated effects of loss of income. This vital function, under the Federal plan, was to be carried on *by the States* in the systems which the Federal Act sought to stimulate.

The Federal plan was simply this: As most States were hesitant to set up unemployment compensation systems, because of the disadvantage it would impose upon their industries in interstate competition, the Federal plan levied a tax on employers of *all* States, and then proceeded to allow an offset credit up to 90 per cent of the Federal tax to those employers who contributed to State unemployment compensation funds. The combination of the nation-wide tax and the offset credit for amounts paid into State funds thereby equalized the burden on all industries. Since employers of all States were obliged to pay the Federal payroll tax, and yet the Federal Government paid no benefits to workers, the plan of the Federal legislation both removed the fear of disadvantage in interstate competition and offered an inducement to the States to set up approved unemployment compensation systems whereby the State employers could obtain the offset credit and the State workers could obtain benefits in the event of unemployment.

Further to encourage the States to establish unemployment compensation systems, Congress, in Title III of the Social Security Act, provided for grants to cover the administrative costs of such systems. The funds for such grants are appropriated by Congress from the 10 per cent of the Federal tax which the Government retains for the purpose of meeting the costs of administering the State unemployment compensation systems. However, as in Title IX, the State unemployment compensation laws are required to meet certain minimum criteria.

As stated by the President in his message to Congress on January 17, 1935,[4] sponsoring the Federal law:

> "With respect to Unemployment Compensation, I have concluded that the most practical proposal is the levying of a uniform Federal pay roll tax, 90 per cent of which should be allowed as an offset to employers contributing under a State Unemployment Compensation Act. The purpose of this is to afford a requirement of a reasonable uniform character for all states cooperating with the Federal Government, and *to promote and encourage the passage of unemployment compensation laws in the states.* The ten per cent offset should be used to cover the cost of Federal and State administration of this broad system." (Emphasis added.)

The 90 per cent credit provision in the Federal law was designed to encourage the passage of State unemployment compensation laws which would provide the actual protection against unemployment by the payment of benefits. It provides that each employer may reduce his Federal tax up to 90 per cent by the amount he has contributed to a State unemployment compensation fund.

The Federal tax being 3 per cent of the payroll, practically all States enacted legislation calling for a standard tax of 2.7 per cent of the payroll of employers subject to the scope of their legislation, the 2.7 per cent rate being equivalent of 90 per cent of the Federal tax. Thus an employer paying the full State tax and offsetting this amount against his Federal tax paid no more than if he had paid the full Federal tax to the Federal Government, yet the amount he paid to the State went into the funds

[4] Cong. Rec., Vol. 79, Pt. 1, p. 546.

which actually operated as the protective device against the menace of unemployment.

Under normal conditions where the employer is solvent, the credit provisions operate as follows:

If a Massachusetts employer had a taxable payroll in the amount of $100,000 in the year 1938, it would have had a Federal tax (without deducting the offset credit) of $3000. Contributions to the Commonwealth of Massachusetts at the rate of 2.7 per cent would amount to $2700. If the employer paid the State, he would be able to credit the State payments against the Federal tax to the extent of 90 per cent of the latter. Since the amount of $2700 is exactly 90 per cent of $3000, the amount of the Federal tax, the employer would be entitled to offset the full amount of the payment to the State against the Federal tax and the amount actually due the Federal Government would have been $300, rather than $3000.

The plain purpose of the credit is to build up an adequate fund through the payment of contributions into the State unemployment compensation systems through which the fundamental purpose of the entire legislation would be effected. Clearly, Congress was not concerned with Federal revenue in this measure, for the credit provision clearly indicates that 90 per cent of the tax was never intended to flow into the Federal revenue. That 90 per cent was a lever to pressure the States into enacting unemployment compensation systems necessary to fulfill the end sought by the Social Security legislation. It must be borne in mind that the Federal Government paid no benefits and the success of the plan to combat unemployment depended on the State systems which insured the worker against loss of income in the event of unemployment.

That these principles were uppermost in the mind of Congress in extending the credit is apparent from an examination of the reports of both the Senate Finance

Committee and the House Committee on Ways and Means.[5] Moreover, Congress believed that the general welfare of the country would be better served by the payment of contributions into State unemployment compensation funds than by the payment of the tax to the Federal Government.

Steward Machine Company v. *Davis*, *supra*, p. 589.

Under Title IX, the 90 per cent credit may be taken when the State has been paid on or before the last day on which the employer is required to file its yearly Federal return, *i.e.*, February 1 of the following year. However, if the payment was made to the State after February 1, but on or before the following June 30, a credit of 81 per cent was permitted against the Federal tax. This reduction in the amount of credit allowed after February 1 provided an inducement to employers to make prompt payment to the States.

Further evidence in Title IX that Congress was primarily interested in building up the State funds lies in the removal of the time limitation for the obtaining of the full 90 per cent credit in those cases where the assets of the employer are in the hands of a court of competent jurisdiction at any time between the due date and the following June 30.

Nor is it only in Title IX that Congress has evidenced its intent to build up State funds, for time and time again Congress has demonstrated that it is the payment of contributions to the States which advances the purposes of the Federal Government. Although the credit against the Federal tax was originally allowed only if contributions

[5] Senate Report No. 628, 74th Congress, 1st Session, p. 15; House Report No. 615, 74th Congress, 1st Session, p. 16.

to State funds were paid within a specified period of time, Congress has repeatedly amended Title IX so as to extend the credit to taxpayers who are delinquent in the payment of contributions, in order to induce them to pay their contributions to the States.[6]

In the Second Revenue Act of 1940, Congress waived the time for obtaining credit against the Federal tax in the case of any taxpayer who was delinquent in his 1936, 1937, 1938 or 1939 contributions to a State fund. Such taxpayers were allowed the full 90 per cent credit if they paid their 1936, 1937 or 1938 contributions to their own State before December 6, 1940. As to the 1939 contributions, the credit was limited to 81 per cent of the Federal tax, except that the full 90 per cent credit could be taken regardless of the date when paid to a State fund, in those cases where the assets of the taxpayer were in the control of a receiver appointed by or under the control of a court in the period subsequent to the passage of the Act and December 6, 1940.

In the same Act, another special exception is made where contributions have been paid by mistake to the wrong State. In such case, payment under the proper State law is considered to have been made on the date of the erroneous payment, for the purposes of credit against the Federal tax.

The Revenue Act of 1941 continued the policy of encouraging the payment of delinquent contributions to the State by allowing full credit against the Federal tax for the payment of State taxes for 1936, 1937 and 1938, and by allowing a credit of 81 per cent for the payment of 1939 and 1940 State unemployment compensation contributions.

Finally, in the Revenue Act of 1943 (Section 602, Public Law 235, enacted February 25, 1944) Congress extended

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[6] Section 1601, Internal Revenue Act of 1939; Section 701, Second Revenue Act of 1940; Section 701, Revenue Act of 1941; Section 602, Revenue Act of 1943.

the 81 per cent credit offset for the payment of delinquent taxes for any year, *regardless of the date of payment of State contributions.*

It is to be stressed that, in the absence of these foregoing enactments waiving the time limitations, the Federal Government would have been entitled to the full 3 per cent, *regardless of whether or not the State was paid.* Yet the Federal Government has repeatedly foregone the collection of taxes *actually due to it* in order to induce payment of contributions into State funds. It is apparent that Congress intended the Federal Government should receive only three-tenths of 1 per cent and that the additional amount which it continually waived in favor of the payment into State funds was the device whereby taxpayers would be induced to pay their State contributions.

Thus, by the numerous exceptions extending the time for credit, Congress has clearly indicated that its prime concern is in the building up of State funds for the payment of unemployment benefits. *Any doubt that Congress did not consider this as a source of revenue for the Federal Government is resolved by the 1937 Act of Congress,*[7] *wherein Congress authorized an appropriation in excess of $20,000,000 to the unemployment compensation fund of the State of Illinois. This represented 90 per cent of the taxes which the Federal Government had collected from Illinois employers prior to the enactment of the Illinois Unemployment Compensation Act.*

The intention of Congress to achieve the purposes for which Title IX was enacted, through the payment of contributions into State unemployment compensation systems, is strikingly revealed in this action, which was part of legislation which turned back 90 per cent of the taxes

[7] Public Act 353, Chapter 755, 50 Stat. 754; Second Deficiency Appropriation Act of 1938, Chapter 681, 52 Stat. 1148.

collected from employers prior to the enactment of State systems into the State unemployment compensation systems which had been established subsequent to the initial payments of taxes under Title IX. Nothing could demonstrate more clearly the Congressional intent that the State should receive 90 per cent of the amount due the Federal Government under Title IX."

Further illustration of the interest of Congress in this measure as part of a plan to stabilize employment and not as a revenue source is disclosed in its willingness to allow the taxpayer to offset against the Federal tax the *credit* which he has received against State contributions under a State plan of experience rating. Ordinarily, where the Federal tax is 3 per cent of the payroll and the State tax is 2.7 per cent, contributions paid into the State fund equal 90 per cent of the Federal tax and the entire credit is obtained.

However, under the "experience rating" provisions of the Massachusetts Unemployment Compensation Act and of the Acts of other States, employers may pay contributions at a lower rate; in Massachusetts as low as five-tenths of 1 per cent. Thus, employers who have a stable employment record are required to pay contributions which amount to considerably less than 90 per cent of the Federal tax. This experience rating plan by the reward of a lower rate is intended to induce employers to stabilize their employment, and so, if the employer were allowed to credit against the Federal tax only what he *actually* paid into the State fund, his total tax would remain the same and the inducement would fail of its purpose. Consequently, to avoid disappointing this incentive, the Federal law [8] permits the taxpayer, in addition

[8] Title IX, Social Security Act, 1937; Section 1602, Internal Revenue Code, 1939.

to the credit for the amount actually paid to the State funds, to take a further credit equal to the difference between the amount of State contributions which he would have had to pay, had he not secured the reduced rate, and the amount that he actually paid to the State. In other words, the additional credit equals the amount of the reduction in the State tax.

This provision illustrates quite clearly the obvious intention of Congress that the United States was to receive only three-tenths of 1 per cent and that Congress was willing to offset against the Federal tax not only the actual amounts paid into State funds but also the credits allowed by the States under approved experience rating plans.

There is still further proof, if need be, of the deep concern which Congress has manifested in the maintenance and growth of State unemployment compensation funds. Congress has fully recognized that such funds would play a major role during the period of post-war readjustment and would serve as the first line of defense for the millions of workers employed in war industries who would be laid off and unemployed during industry's reconversion and readjustment to peace-time production. The Senate and the House appointed Special Committees on Post-War Economic Policy and Planning, which held extensive hearings on the problem of unemployment compensation in the post-war period.[9] Interviews with representatives of important government and private agencies on post-war problems and plans disclosed that "The fear of unem-

[9] Hearings before the Special Committee on Post-War Economic Policy and Planning, United States Senate, 78th Congress, 2d Session, Pt. 3, Unemployment Compensation; Hearings before the Special Committee on Post-War Economic Policy and Planning, House of Representatives, 78th Congress, 2d Session, Pts. 2 and 3, Economic Problems of the Transition Period.

ployment after the war colors the thinking of all the agencies interviewed. Those concerned with the labor problems give it first rank in their planning."[10] As a result of the recommendations of the said Special Committees on Post-War Economic Policy and Planning,[11] Congress enacted legislation guaranteeing the solvency of State unemployment compensation funds. The War Mobilization and Reconversion Act (Title XII)[12] authorizes loans to the several States for the purpose of bolstering State unemployment funds.

From the foregoing it is evident that Congress never contemplated that the full 3 per cent would be paid to the Federal Government, as the United States will perhaps contend. The primary concern of the Federal legislation was not in revenue to build up the Federal treasury, but, on the contrary, to force the accumulation of State funds for the payment of benefits. It is apparent that Title IX was intended to collect a Federal tax sufficient only to enable the United States, through the Social Security Board, to provide for the administration of State unemployment compensation systems. Any accrual to the general revenue has been incidental and was not contemplated. The tax collected has been more than ample to meet the need.[13]

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[10] Senate Document No. 106, 78th Congress, 1st Session, p. 79.

[11] Senate Report No. 539, Pt. 5, 78th Congress, 2d Session, p. 6; House Report No. 1855, 78th Congress, 2d Session, pp. 27-28.

[12] 50 U.S.C. App. 1667, Senate Report No. 565, 79th Congress, 1st Session, p. 2.

[13] On June 7, 1944, in hearings before the subcommittee of the Committee on Appropriations, United States Senate, 78th Congress, 2d Session, on H.R. 4899, Chairman of the Social Security Board Altmeyer, at page 39 of the hearings report, stated:

"That is another phase, I think that should be borne in mind. The Federal Government gets three-tenths of one per cent of the three per cent unemployment compensation tax which is levied by the Federal Government. That three-tenths of one per cent has

To refuse to recognize that payment to the State would be applicable against the Federal tax under the offset provisions of the Federal legislation would deprive the State of funds needed to pay benefits, thereby defeating the patent intent of Congress. *It must be emphasized that the employees of a delinquent insolvent employer must be paid benefits under Massachusetts law if they are otherwise eligible, regardless of whether or not the State collects the corresponding contributions from the employer.* Congress, by the numerous exceptions and extensions, has evidenced that it considers payment into the State funds as more important to the fundamental purpose of social security than payment into the Federal treasury.

Section 3466 of the Revenue Code does not enter into this consideration; for there is no question of priorities in the State's contention. It is simply a question of the intention of Congress—whether Congress intended that the Federal tax could be satisfied by payment into a State fund. The question must be answered in the affirmative.

The same conclusion was reached by the United States District Court in the case here at bar, where the Court stated (65 F. Supp. 763):

> "The question, nicely analyzed, seemed to me to be one not of priority but of alternative obligation.
>
> "The force of that analysis seemed to me to be more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548 was stressed. *As to 90 per cent of the taxes under that Title the objective of Congress was not to collect Federal reve-*

been $450,000,000 in excess of the annual appropriations that Congress has made to the various States for the administration of The Unemployment Compensation Act. So at the present time the Federal Government is $450,000,000 ahead."

nues but to stimulate the creation of and payment to State unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under State unemployment compensation plans.

"The correctness of the foregoing reasoning seemed to me to be proved by a supposititous case. Suppose A, an insolvent, with $200 in assets, owed $100 to the United States for 1938 Title IX taxes, $90 to Massachusetts for 1938 unemployment compensation contributions and $200 to general creditors. Can it be supposed that a court that was sensitive to the principle of marshalling assets would distribute the assets so that the United States received the first $100, Massachusetts the second $90, and the general creditors $10? To do that would give the two governments more than Congress contemplated and restrict the general creditors to 5 cents on the dollar. Would not a court that was mindful of the strict legal rights of the two governments, of the policies declared in their legislation and of the rights of the general creditors to be subject to no greater priorities than those governmental rights and policies require, distribute $10 to the United States, $90 to Massachusetts, and $100 or 50 cents on the dollar to the general creditors? *This would allow the two governments to receive all that they claimed from the insolvent before his insolvency and would follow the rules of priority established by R.S. § 3466.*" (Emphasis added.)

Even if one does consider Section 3466 in connection with the matter, the State's contention is not inconsistent

with the priorities established by that provision. Section 3466 requires that debts due the United States "be first satisfied." The statute does not say and does not mean that a debt in all cases must be fully paid in cash. For example, the debt may be compromised,[14] and property may be received in payment.[15] The word "satisfied" clearly expresses this thought. An accord and "satisfaction" has long been a recognized means of discharging a debt.

Any construction that the Federal Government must be paid the full 3 per cent in cash first would lead to absurd situations. Assume for the purpose of illustration that the debtor owed the sum of $10,000 to the United States for Federal unemployment tax, and that he owed the State $9000 for unemployment contributions. Assume further that there is available for distribution the amount of $10,500. Yet, if, as may be argued by the Government, the full amount must first be paid to the Federal Government in cash, with no allowance for the offset credit, an absurd situation results. In such case the Federal Government would receive the full $10,000, and $500 would remain for the State. However, the debtor could then obtain a refund from the Federal Government because of the $500 payment to the State on the basis of the offset credit. The $500 refunded by the Federal Government then would be applied to the balance owing to the State and thus in turn qualify the debtor's estate for a refund from the Federal Government for this second $500 paid to the State. This process could be repeated until the State had been paid the full amount of $9000 and the Federal Government retained the amount of $1000, *which was all*

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[14] Revised Statutes, Section 3469, 31 U.S.C. 194; Internal Revenue Code, Section 3761.

[15] Op. Atty. Gen. 298.

that Congress intended the Federal Government should get where a State system had been set up. And certainly Congress never intended that such circuitous process would have to be resorted to in order for the State to obtain the contributions Congress intended it to have.

Thus, in the foregoing case, if the debtor had remained solvent, the State would have received $9000 and the United States $1000. The same result would follow even though the debtor became insolvent but the assets were $10,001 or more. This ultimate result would certainly be in accord with the expressed intention of Congress. But if the assets amounted to $10,000 exactly or less, the interpretation that the Federal Government must be paid its 3 per cent in cash without allowance for the offset credit would give the Federal Government a windfall of $9000, at the expense of the State unemployment compensation funds. Such a result would certainly distort the end sought to be accomplished by this legislation. The additional 90 per cent, never contemplated by Congress as revenue but intended more or less as a penalty to prod the States to create unemployment compensation systems, would be converted into a penalty on the State which had so created a system at the prompting of Congress. For, as pointed out, the State has assumed the obligation of paying benefits to the former employees of the employer regardless of whether or not it has collected the corresponding contributions from the employer.

The United States Government, in support of its contention that it should receive the full 3 per cent Federal unemployment tax, will no doubt rely upon this Court's decisions in *People, ex rel. Gordon,* v. *Campbell,* 329 U.S. 362, and *People, ex rel. Gordon,* v. *United States,* 328 U.S. 8.

Those cases are not controlling on this issue, for, as we have already pointed out, the statements concerning prior-

ities with regard to Title IX taxes are *dicta*. The facts and issues in these two *Gordon* cases were such that it was merely a question as to the relative status of State contributions and taxes under Title VIII.

But it will no doubt be asserted that the legislation under Title VIII and Title IX are so closely related that the reasoning of the Supreme Court is decisive on issues arising under Title IX as well as Title VIII.

It is true that both Titles are designed to promote the economic security of the worker. Title VIII is directed against insecurity caused by loss of income resulting from the incapacities of old age. Loss of income due to the recurrent periods of individual unemployment and to mass cyclical unemployment is sought to be corrected in Title IX.

But, however related the purposes for which Titles VIII and IX were enacted, the means used to achieve that result are different. *Under Title VIII the Federal Government has undertaken the payment of old age benefits. Under Title IX the Federal Government does not pay benefits to unemployed workers; that is undertaken by the States* and the offset credit of 90 per cent of the Federal tax is considered as the means of inducing the establishment of State systems. *There is no offset allowance against taxes for Federal old age and survivors' insurance under Title VIII*, for these funds are needed for the financing of the benefit payments under Title VIII. There is the allowance of the offset credit under Title IX because the Federal Government pays no unemployment benefits and those funds paid into the State systems are accomplishing the Federal purpose. Thus, this Court could say, as it did in *Steward Machine Co.* v. *Davis*, 301 U.S. 548, that the needs of the Federal treasury could be cared for as well by the payment of unemployment compensation contributions to the States as by payment of taxes to the United States.

Thus, although both Title VIII and Title IX have the same end in view, economic security for workers, *the means used to achieve that purpose are divergent.* In the one, the whole tax was intended to be collected as revenue for the financing of benefits to be paid by the Federal Government. In the other, only 10 per cent was intended to come into the Federal treasury, and the rest was to be channelled into State unemployment compensation funds, there to be used in the payment of benefits.

Nor, as has been pointed out, is there a question of priorities. The question is solely whether Congress intended that the Federal claim for unemployment taxes could be "satisfied" by the offset credit for funds paid into State unemployment compensation funds. That such was the Congressional intent has been amply demonstrated.

The *Gordon* cases are not controlling as to the instant case for the further reason that in the *Gordon* cases the State of Illinois sought to enforce the 90 per cent credit allowed to the taxpayer. There is no provision whereby a State may avail itself of this credit. In the instant case the *taxpayer* seeks the 90 per cent credit after having complied, by payment to the State, with the provisions of Section 902.

The United States will probably also contend that *only* the *taxpayer* can pay the State and offset the credit against the Federal tax. That contention ignores the Federal legislation itself, which provides that State contributions may be made and the offset credit allowed when the assets are in the possession of a receiver, trustee or a court of competent jurisdiction.

Section 902(a) of Title IX of the Social Security Amendments of 1939 provided that, in cases where the assets of an employer came into the custody of a receiver any time after August 10, 1939, and until October 9, 1939, the re-

ceiver could obtain the Federal credit for the years 1936, 1937 and 1938 by paying the State.

Section 1601(a)(3) of the Federal Unemployment Tax Act permits the full 90 per cent credit for the preceding year at any time if the assets of the employer come into the possession of a receiver, trustee or a court of competent jurisdiction between the due date and the following June 30, and the State is paid.

Section 701(a) of the Revenue Act of 1940 provided that, if the assets of the employer are in the control of a receiver appointed by or under the control of a court at any time between October 8, 1940, and December 6, 1940, 81 per cent of the credit for 1939 may be obtained by paying the State.

Section 701(b) of the Revenue Act of 1941 permitted a receiver appointed during the extension of time in which a solvent employer could pay the State and thereby obtain the Federal offset to obtain an 81 per cent credit for the year 1940 by paying the State at any time.

A similar provision (Section 602(b), Revenue Code of 1943) permitted such credit for the years 1941 and 1942.

Thus Congress has continuously indicated that it intended that the credit offset could be obtained by payment to the State, *even though insolvency had intervened and the payment is made under a receiver, trustee or court of competent jurisdiction.* This is consistent with the Congressional concern to protect the State funds from which benefits would be paid, even at the expense of the Federal tax.

As for the allowance of the offset frustrating the priority of the Federal Government, it should be noted that Congress has specifically provided that such allowance be permitted in cases of insolvency and further, the Federal priority is *not* denied, for the Federal claim is satisfied to

the same extent by the payment and credit offset as it would be if the payment were made in cash.

In the instant case the funds available for payment of unemployment taxes are insufficient to pay the Federal Government its 10 per cent and the State its full 90 per cent of the Federal claim. *Accordingly, there are three possible methods of handling the offset allowance.*

First Method.

In this method, assume that the full 3 per cent owed to the Federal Government was $10,000, that the amount owed to the State for unemployment contributions was $9000, and that the available funds of the debtor amounted to only $5000. If the entire $5000 is paid to the United States first, its claim will have been satisfied to the extent of $5000 and will remain unsatisfied to the extent of $5000.

If, however, the $5000 is paid to the State, the payment to the State will have the effect of reducing the claim of the United States by the amount of $5000, due to the offset credit, and the unsatisfied part of the claim of the United States remains $5000. Thus the Federal claim is reduced and *satisfied equally* by payment directly to the Federal funds or to the State.

Thus, in the instant case, by this method all funds available for the payment of unemployment taxes would first be applied to the payment of the State's claim for unemployment contributions and the Federal claim correspondingly reduced.

Section 902 as amended gives the *taxpayer or his assignee* the option of doing one of two things: He can pay the United States Government directly, pursuant to the provisions of Section 901, or he may elect to pay the State

Government and thereby receive the credit provided for by Section 902. The exercise of this option to pay the State by *an assignee of the taxpayer* is not in violation of Section 3466 of the United States Revised Statutes, since the payment is made to the State with the consent of the Federal Government and at its express invitation.

The language of Section 902 as amended specifically states that the "*taxpayer* shall be allowed credit for the amount of contributions" paid into an unemployment fund under a State law. There is no reference or language of any kind indicating that this credit can be taken by a State. Recognition of the credit provision on behalf of the taxpayer as against the taxes due the Federal Government is consistent with the indicated purposes of the Social Security Act.

Steward Machine Company v. *Davis*, 301 U.S. 548.

The exercise of this option by the *taxpayer's assignee* in paying the State and receiving therefor a credit from the Federal Government is an action consistent with and not in violation of the provisions of Section 3466.

Second Method.

The second method is the treatment accorded the offset credit by the Federal District Court in the case at bar (65 F. Supp. 763), where the Court discusses and analyzes the decision of the United States Supreme Court in *People, ex rel. Gordon,* v. *United States, supra.* The District Court ordered (after the payment of capital stock taxes and Title VIII taxes) that 10 per cent of the Federal claim

be paid first, and that the balance be paid to the State, with the offset credit resulting therefrom reducing the Federal claim correspondingly. The Court said (referring to *People, ex rel. Gordon, v. United States*):

> "Mr. Justice Black had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States had not given the taxpayer the option to make payment to Illinois instead of to the United States. That, as I have said, is a problem less of priorities than of the discharge of alternative obligations and of marshalling assets. *In other words, Mr. Justice Black did not specifically consider whether a possible arrangement of claims ought not to be as follows: in a definitely preferred category the claim for capital stock taxes, the claim for Title VIII taxes, and the claim for 10 per cent of Title IX taxes;* and in what I can best describe as a suspended category the claim for 90 per cent of Title IX taxes and the claim for State unemployment compensation contributions,—the taxpayer *or his assignee or a court charged with administration of insolvent estates having the right to elect to pay the State and defeat 90 per cent of the United States Title IX claim;* . . ." (Emphasis ours.)

Using the same illustration as in the first method, where the Federal claim was $10,000, the State claim for contributions was $9000, and the funds available for distribution amounted to $5000—under the treatment of the Massachusetts Court the Federal Government would receive 10 per cent of its claim or $1000 and the balance of available funds would be applied to the State claim, giving the State $4000, or 45 per cent of its claim.

The inequities of this method are apparent in that it allocates a disproportionately large share of available funds for the costs of administration at the expense of the State funds which are devoted to the payment of benefits, the actual purpose of the legislative program. This is contrary to the intention of Congress, which regarded 90 per cent as the proper share to safeguard the funds for the payment of benefits.

Third Method.

The third method is one in which the available funds would be allocated as follows: 10 per cent of the available funds to the Federal Government and 90 per cent to the State Government, the latter amount being offset against the Federal claim. This procedure is in keeping with the underlying purposes of the legislation. It gives consideration to the Federal Government for the amount which is to be used for the administrative purposes, and to the State Government in the maintenance of funds for the payment of unemployment benefits, and *the allocation is made in the proportion which Congress considered would give protection to both the costs of administration and the State funds from which benefits are to be paid.*

Using the same illustration with the Government claim for $10,000, the State claim for $9000, and the available funds of $5000, the allocation of available funds would be as follows: 10 per cent of the available funds or $500 to the Federal Government and 90 per cent of the available funds or $4500 to the State Government.

Thus, in the above example, by means of the offset credit the Federal claim is reduced and satisfied to the extent of $5000, which is exactly the same amount that it would be reduced and satisfied if the full amount of cash were paid directly to the Federal Government.

Proper Method: First Method.

It is respectfully submitted that the proper method of handling the 90 per cent offset allowance is that indicated in the first method discussed. A taxpayer's liability to pay the many types of taxes imposed by the Federal Government is a single liability. There is no provision of law whereby a priority is created in favor of one type of Federal tax over another. The credit provision of Section 902 of the Social Security Act as amended, therefore, is one which can be availed of by the taxpayer or his assignee as against his liability for the payment of any Federal tax. A tax is a debt and the principle that a debtor making a payment to a creditor can direct how the payment shall be applied in the event there is more than one debt has been held applicable to the payment of taxes.

> "Ordinarily when a debtor makes a payment to a creditor, he can direct how the payment shall be applied if there is more than one debt, and this rule has been applied to payment of taxes."
>
> *Standard Oil Co.* v. *United States Court of Claims*, 5 F. Supp. 976, 986.
>
> *National Bank of the Commonwealth* v. *Mechanics' National Bank*, 94 U.S. 437.
>
> *Korbly* v. *Springfield Institution for Savings*, 245 U.S. 330.

> "Government cannot bind them [taxpayers] by the exercise of any supposed power to make application of the payments made.
>
> "The general doctrine as to the application of payments is, that if the debtors fail to apply them, the government may do so. If both fail, the law will make

the application, as the principles of justice shall require."

United States v. *Linn*, 2 McLean, 501.

The assignee, in making payment to the Commonwealth of Massachusetts, clearly indicated the particular Federal tax to which said payment was to apply, namely, Title IX tax. He, on behalf of the taxpayer, was actually paying *one of the several Federal taxes owed by the taxpayer.* To hold, as did the District Court and the Circuit Court of Appeals, that the capital stock tax and Title VIII taxes had preference over the full payment of the Title IX tax was to create a preference of one Federal tax over another. Such a conclusion would be directly contrary to the application clearly indicated by the taxpayer as to which tax said payment should apply.

The payment made by the assignee of the taxpayer to the Commonwealth of Massachusetts in the case at bar, therefore, is one with reference to which he should receive full credit against the taxpayer's liability to pay the taxes imposed by Section 901 of Title IX of the Social Security Act, Title VIII taxes, capital stock tax, or any other Federal tax of his assignor since the payment was made with the permission of the Federal Government pursuant to the provisions of Section 902.

VII. Conclusion.

In conclusion, the petitioners most respectfully submit that the assignee of the taxpayer, Carlton W. Spencer, had a right to pay in full the unemployment tax owed by the taxpayer to the Commonwealth of Massachusetts, by virtue of Section 902 of the Federal Social Security Act, be-

fore paying *any of the various Federal taxes* owed by the taxpayer.

The petitioners therefore pray that the judgment of the Circuit Court of Appeals for the First Circuit, entered on April 2, 1947, be reversed, and that this Honorable Court order that a judgment be entered for Carlton W. Spencer.

Respectfully submitted,

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JUL 29 1947

No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1947

COMMONWEALTH OF MASSACHUSETTS, ET AL., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 13–18) is reported at 65 F. Supp. 763. The opinion of the Circuit Court of Appeals (R. 29–33) is reported at 160 F. 2d 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 2, 1947. (R. 33). The petition for a writ of certiorari was filed on June 27, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After the priority of the United States for payment of the debts due it has attached under Section 3466 of the Revised Statutes, whether the voluntary assignee for the benefit of creditors of the assets of the insolvent taxpayer was permitted to pay the claim of the State for unemployment compensation contributions and secure a credit for such payment against the unpaid federal unemployment compensation taxes under Section 902 of the Social Security Act, as amended, thus defeating the priority of the United States.

STATUTES INVOLVED

The pertinent parts of the applicable statutes are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

The facts, as stipulated (R. 18–21) and found by the District Court (R. 13), may be summarized as follows:

On February 3, 1939, Somerville Sales and Service, Inc., which was then insolvent in the bankruptcy sense, made a voluntary assignment to Carlton W. Spencer for the benefit of creditors. Spencer, the assignee, converted the assets into cash, realizing the amount of $1,135.11. (R. 13, 19, 20.)

The Collector of Internal Revenue seasonably filed claims with the assignee for 1938 and 1939 federal insurance contributions tax under Title VIII of the Social Security Act in the amount of

$690.05, for 1938 federal unemployment compensation tax under Title IX of the Social Security Act in the amount of $963.08, and for 1939 capital stock tax in the amount of $21, all of which had been duly assessed against the assignor corporation. The Commonwealth of Massachusetts (hereinafter referred to as "the State") likewise filed a claim with the assignee for $803.72, representing 1938 and 1939 state unemployment compensation contributions and interest due from the assignor. (R. 19, 21.)

On October 6, 1939, the assignee disbursed $803.72 to the State in full payment of its claim and paid $331.39, the amount remaining in his hands, to the Collector of Internal Revenue, who credited it against the amount due as federal insurance contributions (Title VIII) tax. (R. 20.) The balance claimed by the United States of $1,342.74 with interest was not paid. (R. 19, 20, 21.)

The United States commenced this suit against the assignee to establish the priority of its claims for taxes under Section 3466 of the Revised Statutes, *infra,* p. 10, and to enforce a personal liability against the assignee to the extent of $803.72 under Section 3467 of the Revised Statutes, *infra,* p. 10, by reason of his payment of the Massachusetts taxes due from the assignor before he had satisfied the taxes due the United States. (R. 1–3, 18.) The State intervened, asserting that it was entitled by law to keep the

$803.72 received from the assignee. (R. 8–11.) It agreed, however, to pay this amount to the United States, if the payment by the assignee to it should be determined to have been made in disregard of the priority of the United States under Section 3466. (R. 13.)

The District Court held that under Section 3466 the United States had priority as to the full amount of the capital stock and federal insurance contributions (Title VIII) taxes due it, and as to 10% of the federal unemployment compensation (Title IX) taxes due it. (R. 13–18.) It ordered the State to pay $610.27 to the United States in liquidation of these taxes and the interest due thereon. (R. 12, 18.) From this judgment both the United States and the State appealed. (R. 12.)

The Circuit Court of Appeals reversed the District Court in part, holding that the United States has complete priority under Section 3466 with respect to its entire claim for unpaid federal unemployment compensation taxes, as well as to its claims for federal insurance contributions and capital stock taxes. (R. 30–33.)

ARGUMENT

We believe that the State has shown no adequate reason for the granting of a writ of certiorari. Its claim (Pet. 4) that the question in this case has not been decided by this Court disregards the fact that *Illinois* v. *United States*, 328 U. S. 8, plainly forecloses its contention here.

There the Court held that under Section 3466 of the Revised Statutes the claims of the United States for both federal insurance contributions taxes under Title VIII of the Social Security Act and federal unemployment compensation taxes under Title IX of the Act were invested with priority over the claim of the State of Illinois for taxes under its Unemployment Compensation Act. This ruling was so summarized in *Illinois* v. *Campbell*, 329 U. S. 362, 366–367.[1] While the Court did not specifically include the capital stock taxes there due the United States within its decision in *Illinois* v. *United States*, *supra* (see footnote 1, p. 9), it follows *a fortiori* that these taxes are debts which are granted priority by Section 3466. *Price* v. *United States*, 269 U. S. 492, 499; *Stripe* v. *United States*, 269 U. S. 503.

As the court below held (R. 30–33), the assignee's payment of the tax due the State and claim for a credit for the payment against the unpaid federal tax under Section 902 of the Social Security Act, *infra*, p. 11, was not effective to destroy the supremacy of the claim of the United States for prior payment in full of all the taxes due it. The priority of the United States under Section 3466 of the Revised Statutes, *infra*, p. 10,

[1] The District Court's opinion in this case (R. 13–18) was rendered prior to *Illinois* v. *Campbell*, *supra*, which expressly stated that both the Title VIII and Title IX federal taxes were held to be entitled to priority under the Court's previous decision in *Illinois* v. *United States*, *supra*.

as to all three kinds of tax attached when the taxpayer, being insolvent in the bankruptcy sense, made the assignment for the benefit of creditors in February, 1939, or to the extent the taxes were assessed after that date, not later than the dates of assessment, and perhaps before. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 93; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *United States* v. *Waddill Co.*, 323 U. S. 353. It is clear that all of these dates were prior to October 6, 1939.[2] At the time the United States acquired priority, the taxpayer had not paid any amount to the State as contributions and it or its assignee could not then claim a credit under Section 902 against the Title IX tax due the United States.[3]

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[2] The stipulation of facts does not give the dates on which the Commissioner assessed the taxes, stating only that they were "duly and seasonably" assessed. (R. 19.) Cf. Paragraph 4 of the assignee's answer. (R. 5.) However, the assessment dates were all prior to October, 1939, as is clear from the fact that the Collector filed proofs of claims, original and amended, for the taxes, with the assignee on March 29, May 13, and June 12, 1939, and on May 8, 1940. (Par. V of complaint (R. 3), admitted (R. 5).) Information received from the Bureau of Internal Revenue confirms that all the taxes due the United States, here involved, were assessed prior to June 13, 1939, the last assessment being made on June 12, 1939, in respect of the 1939 capital stock tax. Thus, priority had unquestionably attached as to all the taxes in favor of the United States before the assignee disbursed the amount of $803.72 to the State on October 6, 1939.

[3] Section 902 of the Social Security Act Amendments of 1939, *infra*, p. 12, authorizes the credit in certain circumstances only upon actual payment to the State prior

As is implicit in *Illinois* v. *United States, supra,* the assignee could not thereafter make a payment to the State without violating Section 3466 because the debts due the United States were required to be satisfied first, and the debts due it exhaust the fund. Whatever option the taxpayer may have had to pay contributions to the State and claim a credit under Section 902 terminated at the time Section 3466 took effect. Section 3466 was not superseded or amended by any provision of the Social Security Act, including Section 902. Cf. *Illinois* v. *United States, supra.*

Moreover, if a taxpayer's assignee is allowed to pay a state's claim and take credit against the Title IX tax due the United States after Section 3466 has come into operation, the result will be to defeat, to a large extent, the priority of the United States, contrary to Congress' intention. In this case if the payment to the State is permitted to stand and a credit against the claim of the United States for Title IX taxes is allowed, the effect is not only to reduce the claim of the United States for Title IX taxes but also, be-

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to the sixtieth day after the date of enactment of the Act, which was August 10, 1939. The payment by the assignee here was on October 6, 1939, within this time limit, but it was after the priority of the United States had attached. It is doubtful also that a voluntary assignee for the benefit of creditors is entitled to claim a credit under Section 902, since he is not the taxpayer or a fiduciary appointed or acting under court order.

cause the insolvent's assets are depleted, to erase its priority in part as to the other debts due it.[4]

It follows that the payment to the State by the assignee was in disregard of the priority of the United States under Section 3466, the precise situation in which the State has agreed to return the amount of $803.72 to the United States.[5] (R. 13.)

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[4] The amount left for the United States after payment of the State's claim was only $331.39, whereas the total amount of its claims for Title VIII and capital stock taxes was $711.05. (R. 19.) The State's contention here gives even less effect to the priority of the United States than did the District Court, which ordered the State to pay $610.27 to the United States (R. 12), on the theory that the United States was entitled to receive prior payment of the Title VIII and capital stock taxes in full and 10% of the Title IX taxes (R. 18). But even on the District Court's theory its computation was wrong. Since the Title VIII and capital stock tax claims should be paid first, only $424.06 of the total fund ($1,135.11) remained for the Title IX and State claims. Section 902 allows a credit against Title IX tax only for the amount actually paid to a State, but not to exceed 90% of the federal tax. Thus, even assuming that the entire $424.06 remaining is available as a credit against the Title IX tax of $936.08, there still remains an unsatisfied federal claim for Title IX taxes amounting to $539.02, which is in excess of the $424.06 available to satisfy both it and the State. Under its priority the United States should be awarded the $424.06 also, with the result that even under the District Court's view, which we believe is erroneous, a correct computation would give the entire available fund to the United States.

[5] As we have shown, the credit, permitted by Section 902 in some circumstances, was not allowable here. Since there is no credit, the argument in the brief *amicus curiae* of the State

CONCLUSION

The decision of the court below is clearly correct, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1947.

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of Illinois (pp. 23–26) that the debts due the United States may be "satisfied" within the meaning of Section 3466 by means of the offset credit for amounts paid a state is not pertinent to this case. The State's claim for contributions is of course not a debt due the United States entitled to priority under Section 3466. *Illinois* v. *United States*, *supra*.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C., 1940 ed., Sec. 191.)

SEC. 3467 (as amended by Sec. 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680). Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C., 1940 ed., Sec. 192.)

Social Security Act, c. 531, 49 Stat. 620:

SEC. 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (42 U. S. C., 1940 ed., Sec. 1101.)

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (42 U. S. C., 1940 ed., Sec. 1102.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some

twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more. * * * (42 U. S. C., 1940 ed., Sec. 1107.)

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

SEC. 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment:

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

* * * * *

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No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1947

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 13–18) is reported at 65 F. Supp. 763. The opinion of the Circuit Court of Appeals (R. 29–33) is reported at 160 F. 2d 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 2, 1947. (R. 33.) The petition for a writ of certiorari was filed on June 27, 1947, and was granted on October 13, 1947. (R. 34.) The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After the priority of the United States for payment of the debts due it has attached under Section 3466 of the Revised Statutes, whether the voluntary assignee for the benefit of creditors of the assets of the insolvent taxpayer is permitted to pay the claim of the State for unemployment compensation contributions and obtain a credit for such payment against the unpaid federal unemployment compensation taxes under Section 902 of the Social Security Act, as amended, thus defeating to that extent the priority of the United States.

STATUTES INVOLVED

The applicable statutes are printed in the Appendix, *infra,* pp. 40–45.

STATEMENT

The facts, as stipulated (R. 18–21) and found by the District Court (R. 13), are as follows:

On February 3, 1939, Somerville Sales and Service, Inc., a Massachusetts corporation, which was then without sufficient property to pay all its debts and was insolvent in the bankruptcy sense, made a voluntary assignment to Carlton W. Spencer for the benefit of creditors. Spencer, the assignee, accepted the assignment and con-

verted the assets into cash, realizing the amount of $1,135.11. (R. 13, 19, 20.)

The Collector of Internal Revenue seasonably filed claims with the assignee for 1938 and 1939 federal insurance contributions tax under Title VIII of the Social Security Act in the amount of $690.05, for 1938 federal unemployment compensation tax under Title IX of the Social Security Act in the amount of $963.08, and for 1939 capital stock tax in the amount of $21, all of which had been duly and seasonably assessed against the assignor corporation. The Commonwealth of Massachusetts (hereinafter referred to as "State") likewise seasonably filed a claim with the assignee for $803.72, representing state unemployment compensation contributions and interest due from the assignor of $775.34 for 1938 and $28.38 for 1939. (R. 13, 19, 21.)

On October 6, 1939, the assignee disbursed $803.72 to the State in full payment of its claim and paid $331.39, the amount remaining in his hands, to the Collector of Internal Revenue, who credited it against the amount due as federal insurance contributions (Title VIII) tax for 1938. The balance claimed by the United States of $1,342.74 with interest has not been paid. (R. 19, 20, 21.)

The United States commenced this suit against the assignee to establish the priority of its claims for taxes under Section 3466 of the Revised

Statutes and to enforce a personal liability against the assignee to the extent of $803.72 under Section 3467 of the Revised Statutes by reason of his payment of the Massachusetts taxes due from the assignor before he had satisfied the taxes due the United States. (R. 1–3, 18.) The State intervened, asserting that it was entitled in law to keep the $803.72 received from the assignee. (R. 8–11.) It agreed, however, to pay this amount to the United States, if the payment by the assignee to it was in disregard of the priority of the United States under Section 3466. The United States agreed that if it prevails, the judgment shall be limited to $803.72. (R. 13.)

The District Court held that under Section 3466 the United States had priority as to the full amount of the capital stock and federal insurance contributions (Title VIII) taxes due it, and as to 10% of the federal unemployment compensation (Title IX) taxes due it. (R. 13–18.) It ordered the State to pay $610.27 to the United States in liquidation of these taxes and the interest due thereon. (R. 12, 18.) From this judgment both the United States and the State appealed. (R. 22.)

The Circuit Court of Appeals reversed the District Court in part holding that the United States has complete priority under Section 3466 with respect to its entire claim for unpaid federal unemployment compensation taxes, as well

as to its claims for federal insurance contributions and capital stock taxes. (R. 30–33.)

SUMMARY OF ARGUMENT

I

It is settled that the insurance contributions, unemployment compensation, and capital stock taxes are debts due to the United States and are entitled to be satisfied first out of the insolvent debtor's property, to the exclusion of the State's claim for contributions due it, under Section 3466 of the Revised Statutes. The requirements of that section are otherwise met by the debtor's voluntary assignment of its property, which was insufficient to pay all of its debts. The liability for all of the federal taxes had been incurred prior to the assignment and the priority of the United States with respect to all of the taxes claimed, therefore, attached to the debtor's property on the date it was assigned, or in any event prior to the payment of the State's claim by the assignee on October 6, 1939.

II

The unemployment compensation tax for 1938 as to which the United States acquired priority was the full tax imposed by Section 901 of the Social Security Act. This is so because on the date the federal preference arose the assignee was not entitled to apply for a credit in reduction of the unemployment tax, which is authorized only

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for payments into an approved state fund by Section 902 of the Act, since he had not then paid any contributions to the State for 1938.

III

The aggregate of the taxes of the United States having a first preference under Section 3466 are in excess of the fund realized from the debtor's assets and the United States as a consequence is entitled to have the whole fund. The result is that the assignee has no property from which to pay the State's claim and he is unable to qualify under Section 902 for any credit, which is authorized only for a precedent payment to the State.

The view that the Congress intended in Section 902 to relinquish the priority of the United States as to 90% of the unemployment compensation tax imposed by Section 901 is not tenable. Such intent was not expressed and there is no reason to imply it in view of the fact that the two sections are not inconsistent. Section 902 in general terms authorizes a credit conditionally but does not deal particularly with the case where a taxpayer has become insolvent in circumstances in which Section 3466 has become operative. Furthermore, both statutes can be given full effect, each according to its own terms. Where, as in this case, the debtor's assets are insufficient to satisfy all of the debts due to the United States, so that a payment of the State's claim in any

amount is impossible, denial of the credit is not because Section 3466 excludes Section 902 but is the result of the requirement for actual payment to a State established by Section 902 itself as a condition precedent to allowance of a credit. Moreover, Section 902 does not grant any credit as a matter of right, but only conditionally, and it thus affords no basis for inferring a waiver of the priority of the United States which under Section 3466 is absolute in terms. Equitable principles can not, of course, be employed to achieve a result which the express terms of both Section 3466 and Section 902 do not support.

To sustain the State's contention would deny priority of payment, contrary to the mandate of Section 3466, not only to the unemployment tax but also to part of the other taxes which are due the United States and which are not subject to reduction by the credit provided for in Section 902 if the terms on which it is granted are met. Further, since the State's claim for contributions is not on a parity with the social security taxes of the United States under Section 3466, as this Court has held, it must follow that a payment of the State's claim would not amount to a satisfaction of the federal tax within the meaning of Section 3466.

IV

Even on the assumption that the assignee is not barred from claiming a credit in some amount

against the federal unemployment compensation tax, the maximum credit allowable would not be sufficient to prevent distribution of all of the debtor's assets to the United States. After subtracting the claims of the United States for insurance contributions and capital stock taxes with interest totalling $803.11, which are not subject to reduction by any credit, from the fund of $1,131.11 realized from the debtor's property, there remains $328 for all other claims. Assuming, contrary to the fact, that this amount could be used to secure a credit in that amount against the federal unemployment compensation tax of $963.08, there would still remain due to the United States $635.08 on its claim for unemployment tax. Since this is a claim having priority over the State's claim under Section 3466, and since it is in excess of the $328 remaining for distribution, it follows that the entire fund realized from the debtor's property must be awarded to the United States.

ARGUMENT

This case is concerned with the question of whether Section 902 of the Social Security Act, as amended (Appendix, *infra*), is to be construed as permitting a debtor's assignee, who holds insufficient assets to pay the taxes claimed by the United States, to pay, after Section 3466 of the Revised Statutes (Appendix, *infra*) according priority to debts due the United States

has become operative, the tax claimed by the State and to take credit for the payment against all or any part of the taxes claimed by the United States. The Circuit Court of Appeals held that Section 3466 required that all of the debtor's property be applied to the satisfaction of the taxes due the United States and that, having done this, nothing remained to pay the State's claim, thus precluding the assignee from securing the credit authorized by Section 902 in certain circumstances for payments of contributions to a State. (R. 29–33.)

The State's contentions appear to be that under Section 902 of the Social Security Act only 10% of the tax imposed by Section 901 of the Act (Appendix, *infra*) is to be collected by the United States (Br. 12–18); that the contributions due the State are a part of the federal tax imposed by Section 901 and their payment amounted to satisfaction of 90% of the federal tax for purposes of Section 3466 (Br. 20–21, 31); and that the assignee had the legal right to elect to pay first the part of the federal tax represented by the State's claim to the exclusion of the other federal taxes which were due (Br. 30–31). It is the position of the United States that none of these contentions is supportable in view of the statutory provisions and previous decisions of this Court and, as the following argument will

show, the Circuit Court of Appeals correctly rejected all of them.

I

THE TAXES CLAIMED BY THE UNITED STATES HAVE PRIORITY UNDER SECTION 3466 OF THE REVISED STATUTES TO THE EXCLUSION OF THE STATE'S CLAIM FOR CONTRIBUTIONS

We believe it is now settled that claims of the United States for insurance contributions taxes, for unemployment compensation taxes, and for capital stock taxes[1] have absolute priority as debts due the United States under Section 3466 of the Revised Statutes, which provides, insofar as here material, that—

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[1] These are the capital stock tax of $21 for 1939 imposed by Section 1200 of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 1200); unemployment compensation tax of $963.08 for 1938, imposed by Section 901 of the Social Security Act; and insurance contributions taxes of $669.39 for 1938 and of $20.66 for 1939, imposed, respectively, by Section 801 and/or 804 of the Social Security Act (42 U. S. C. 1940 ed., Secs. 1001, 1004) and by Section 1400 and/or 1410 of the Internal Revenue Code. (R. 19.) The record does not show whether the insurance contributions taxes were the employees' tax or the employer's tax under the last cited sections of the Social Security Act and the Internal Revenue Code, or a combination of the two. To the extent, however, that the employees' taxes are contained in the two amounts, they were collected and held by the employer-debtor as a special fund in trust for the United States (Sections 802 and 807 (c), Social Security Act (42 U. S. C. 1940 ed., Secs. 1002, 1007); Section 607, Revenue Act of 1934, c. 277, 48 Stat. 680; Sections 1401, 1430 and 3661, Internal Revenue Code) and were not therefore a part of the debtor's funds available for distribution to its creditors and subject to the priority accorded the United States by Section 3466 of the Revised Statutes. Cf. *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, modified, 68

> Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or * * *

Illinois v. *United States*, 328 U. S. 8, so holds with respect to both kinds of social security taxes. Although the property of the insolvent debtor, available for distribution to all creditors, in the *Illinois* case was less than the claim of the United States for the insurance contributions taxes alone, the Court's opinion plainly included the unemployment taxes within the holding. If this point were in any doubt, it is settled by *Illinois* v. *Campbell*, 329 U. S. 362, 366–367, in which the Court stated explicitly that the previous *Illinois* case decided that both types of social security taxes were entitled to priority under Section 3466, if the other circumstances necessary to the application of that section were present. See also *United States* v. *Waddill Co.*, 323 U. S. 353. Moreover, since "it is well settled that taxes are debts within the meaning of Section 3466"

R. I. 358. In *Illinois* v. *Campbell*, 329 U. S. 362, 376, fn. 18, where the record showed the amount of the employees' tax included in the Title VIII taxes there held to have priority, this Court found it unnecessary to decide the point, since the whole amount was entitled to priority over all other creditors under Section 3466 in any event.

(*Illinois* v. *United States*, 328 U. S. 8, 9; see *Price* v. *United States*, 269 U. S. 492) the capital stock taxes are covered by that section also.

Illinois v. *United States, supra*, decided further that the claim of a State for contributions taxes under its own unemployment compensation act is not "tantamount to a claim of the United States" (p. 11) for purposes of Section 3466, and yields, at least in the absence of a prior specific and perfected lien for the State's claim,[2] to the priority of the United States for the taxes due it. See also *Illinois* v. *Campbell*, 329 U. S. 362, 366–367. Cf. *United States* v. *New York*, 315 U. S. 510, which, although it was concerned with the priority and allowance of claims under the Bankruptcy Act, established that the claims of the United States for both kinds of social security taxes and the claim of a State for contributions are separate and distinct claims. The State's argument that its claim represents a portion of the federal tax imposed by Section 901 (Br. 31) is contrary to these decisions.

The taxes claimed by the United States in this case are concededly "due" in the amounts claimed, except with respect to the unemployment compensation tax (see Point II of this argument,

[2] The question is still undecided as to whether such a lien will defeat the priority of the United States under Section 3466. See *Illinois* v. *Campbell*, *supra*, pp. 370–371. Our position is that it does not. In the instant case the issue is not present at all, since the State does not contend that at any time it had a specific and perfected lien.

infra). Putting aside for the present the question as to the amount of the unemployment tax due, this tax, whatever its amount, and the capital stock and insurance contributions taxes are therefore entitled to be "first satisfied," that is, to the exclusion of the claim of the State for the taxes due it under its unemployment compensation law, if the other requirements of Section 3466 are met. It is plain that they are met, and indeed no argument has been made that they are not. It was stipulated that the debtor, Somerville Sales & Service, Inc., made a voluntary assignment of its property for the benefit of creditors and that on the date of the assignment, February 3, 1939, it was without sufficient property to pay all of its debts. (R. 19). This was insolvency in the sense contemplated by Section 3466. *United States* v. *Oklahoma*, 261 U. S. 253:

It is well settled that the priority of the United States under Section 3466 of the Revised Statutes dates from the time the insolvent debtor transfers, or loses control over, his property. *Illinois* v. *Campbell*, 329 U. S. 362, 369–370; *United States* v. *Waddill Co.*, 323 U. S. 353, 355–356; *United States* v. *Oklahoma*, 261 U. S. 253, 260. At the time of the assignment on February 3, 1939, the debtor had incurred the liabilities for all of the taxes claimed by the United States in a total amount of $1,674.13 (R. 2, admitted by the assignee, R. 5, and by the State, R. 8; R. 4),

although some of the taxes were formally assessed after the date of the assignment.[3] Because of the admitted fact that liability for the taxes had then been incurred, we believe that the date of the assignment governs the incidence of priority as to all of the taxes (cf. *United States* v. *State Bank of North Carolina,* 6 Pet. 29; *Price* v. *United States,* 269 U. S. 492), but even if the later dates of assessment control, a point which was left undecided in *Spokane County* v. *United States,* 279 U. S. 80, 93, priority in the United States, even as to the taxes assessed after the assignment, had been created prior to the payment to the State on October 6, 1939. It has never been urged in this case that the payment to the State, which is the only event relied on by the State to defeat the priority of the United States, preceded the date on which Section 3466 came into operation with respect to all the taxes claimed by the United States.

II

THE RIGHT OF PRIORITY ATTACHED TO THE FULL AMOUNT OF THE UNEMPLOYMENT COMPENSATION TAX FOR 1938 CLAIMED BY THE UNITED STATES

As previously stated, the amounts of the taxes "due" to the United States and entitled to pri-

[3] The record in this case shows only that the taxes were duly and seasonably assessed (R. 19) but, as indicated in our Brief in Opposition to certiorari (p. 6), some of the taxes due the United States were assessed after February 3, 1939, but prior to October 6, 1939.

ority within the meaning of Section 3466 are not in question with the exception of the unemployment compensation tax for 1938. As to this tax, the District Court took the view that the United States acquired a right of complete priority only as to 10% of the amount of $963.08 claimed by the United States. (R. 17–18.) The District Court's view was not accepted by the Circuit Court of Appeals and it squarely collides with the controlling statutory provisions.

The liability arose under Section 901 of the Social Security Act (Appendix, *infra*) which levies a tax upon the total wages payable by an employer, as defined in Section 907 (Appendix, *infra*) with respect to employment as defined in the Act, during that year. Section 902 of the Act (Appendix, *infra*) provides that the taxpayer may credit against the tax imposed by Section 901, but not to exceed 90% thereof, the amount of contributions, with respect to employment during the taxable year, "paid by him," before the date of filing his federal return for the year (for 1938 this was on or before January 31, 1939—see Section 905 (b) (Appendix, *infra*)) into a certified state unemployment fund.[4] Section 902 (a) of

[4] H. Rep. No. 615, 74th Cong., 1st Sess., p. 34 (1939–2 Cum. Bull. 600, 608), stated:

"SECTION 902: A taxpayer may credit against his tax the total amount of contributions he has paid to State unemployment compensation funds in accordance with State unemployment compensation laws. The credit against the tax

the Social Security Act Amendments of 1939 (Appendix, *infra*) and Section 602 (a) of the Revenue Act of 1943 (Appendix, *infra*) both extended the time in which payment into a state fund of contributions for the years 1936, 1937 and 1938 could be made for purposes of securing a credit, but these amendments did not dispense with the

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measured by wages payable with respect to employment in a calendar year will be allowed only for contributions which themselves are paid (before the date for filing the tax return under this title for such year) with respect to employment in such year.

"The total credit which a taxpayer may claim against his tax for any year shall not be more than 90 per cent of the tax. Thus if the tax is $100 the total credit which may be claimed can not be more than $90, even though the total amount of contributions may be greater than that."

S. Rep. No. 628, 74th Cong., 1st Sess., p. 46 (1939–2 Cum. Bull. 611, 621–622), was substantially identical with the above, and in addition contained a further explanation of the credit as follows (pp. 12–13 (1939–2 Cum. Bull. 612–613)):

"In States which have genuine unemployment compensation laws the employers can present as a credit against the Federal tax the contributions which they have made to the unemployment compensation funds of these States. This credit, however, is allowed only up to 90 per cent of the Federal tax, 10 per cent being payable into the Federal Treasury in any event.

"This tax offset device is modeled after the provision in the Federal estate tax law, under which a credit is allowed up to 80 per cent of the Federal tax for amounts paid under State inheritance tax laws. With a uniform tax and this offset device, employers in all States will be put in an equal competitive position. No State can gain any advantage through failing to establish an unemployment compensation system."

* * * * *

necessity for actual payment to the State as a condition precedent to allowance of the credit.[5]

Under these statutes the full tax is due the United States until the taxpayer has qualified for a credit against it by paying contributions to a State. This Court stated in *United States* v. *New York*, 315 U. S. 510, 517:

> The amount of the tax assessable under § 901 is definite and fixed, once the single variable, the total of the wages paid during the year, is determined. Although the employer is free to obtain a credit against it by contributing to his state fund, it cannot be said that it is any the less a tax because the employer has failed, either through choice or lack of resources, to make such a contribution. * * *

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[5] Commencing with the year 1938, Sections 909 and 910 of the Social Security Act made provision for an additional credit, not material in this case, equal to the difference between the amount of contributions an employer would have been required to pay if he had been subject to the highest rate fixed by the State and the amount he actually paid the State under a reduced rate applicable to him because he maintains an approved guaranteed employment account or contributed to an approved pooled fund or reserve account as defined in Section 910. (Cf. the State's brief, pp. 16–17.) The aggregate of the credit for payment to a State and the additional credit was limited by Section 909 (c) to an amount not to exceed 90% of the federal tax. The provision for the additional credit was continued in amended form in Section 1601 (b) and Section 1602 of the Internal Revenue Code, as amended by Sections 609 and 610 of the Social Security Act Amendments of 1939. However, as stated, the additional credit is not involved in this case and no further reference will be made to it.

S. Rep. No. 734, 76th Cong., 1st Sess., p. 91 (1939–2 Cum. Bull. 565, 592), also confirms that the employer is liable for the full tax until the credit has been earned by satisfying the conditions on its allowance in Section 902. And see *Matter of White Plains Oil Corp.*, 287 N. Y. 141. Cf. *Florida* v. *Mellon*, 273 U. S. 12. Furthermore, it must be emphasized that, even when a payment is made, credit is allowable only in the amount paid, but is limited to a maximum figure of 90% of the federal tax, and in some circumstances to a maximum amount of 81% of the federal tax (see Section 602 (a) of the Revenue Act of 1943).

No contributions were paid to the State either by the taxpayer-debtor or by its assignee prior to October 6, 1939, and this date was the very first on which a credit could be claimed, if it could be had at all, under the terms of Section 902.[6] But, as has been shown, the United States

[6] The payment to the State of the contributions due it on October 6, 1939, was a date which was within the period allowed for paying a state and claiming a credit as extended by Section 902 (a) of the Social Security Act Amendments of 1939, which was enacted on August 10, 1939, and by Section 602 (a) of the Revenue Act of 1943. An employer of eight or more persons (Section 907) is the taxpayer liable for the tax and eligible for the credit if he meets the conditions of Section 902. While the assignee is not such a taxpayer literally since he had no employees himself, Article 205 of Treasury Regulations 90 (1936 ed.) provides that an employer for purposes of the Title IX tax may be a person acting in a fiduciary capacity or on behalf of another, such as, *inter alia*, an assignee for the benefit of creditors. But

acquired the right to prior payment of all the taxes due it, including the tax imposed by Section 901, before the payment to the State on October 6, 1939. Since on the date when the United States acquired first preference under Section 3466 the assignee was not entitled to any credit, it must follow that the priority of the United States attached to the full tax of $963.08 claimed to be due.[7] This amount, added to the Title VIII and capital stock taxes due the United States, results in an aggregate amount of $1,674.13, which has preference under Section 3466.

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even if the assignee is treated as the taxpayer for purposes of the credit and even though he undertook to pay the State within the time limitation fixed by the amendments to Section 902, nevertheless, as developed, *infra*, the payment does not qualify him for any credit because it was rendered ineffective by Section 3466, which operated prior to the payment to segregate all the debtor's assets to satisfaction of taxes due the United States.

[7] It may be noted here that the District Court was wrong in treating only $96.31, or 10% of the federal tax, as due the United States as a priority debt even assuming *arguendo* that the October 6th payment qualified the assignee for a credit in the full amount paid. The amount paid to the State was $803.72, consisting of 1938 tax and interest of $775.34 and 1939 tax and interest of $28.38. (R. 21.) The federal tax of $963.08 was for 1938 only. (R. 19.) Section 902 in terms authorizes a credit against the federal tax for a particular year of the contributions paid to a state fund with respect to employment during the *same taxable year*. See also H. Rep. No. 615, 74th Cong., 1st Sess., p. 34, quoted in footnote 4, *supra*. Thus the maximum credit allowable against the 1938 federal tax would be the 1938 State tax in-

III

PAYMENT OF THE STATE'S CLAIM WAS IN VIOLATION OF THE PRIORITY OF THE UNITED STATES

The total of the taxes due the United States of $1,674.13 is in excess of the total fund of $1,135.11 realized from the debtor's property. Thus, the United States has first claim to the entire fund under the clear mandate of Section 3466, leaving nothing from which the State's claim could be paid. And since a credit is allowable under Section 902, as amended, only for amounts paid a State and since there are no assets of the insolvent debtor with which to pay the State any amount, there is no way in which any credit may be procured by the assignee upon the facts of record in this case, as the lower court held. (R. 33.) See also *Matter of White Plains Oil Corp.*, 287 N. Y. 141.

The fact that the assignee actually undertook to pay the State the amount of its claim is of no significance. The issue here is whether such payment could properly be made after all the

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cluded in the payment. This was something less than $775.34; that amount includes both tax and interest but the record does not show the amounts. Deducting the State tax, there would be left unsatisfied an amount in excess of $187.74 of the federal Title IX tax, which is the amount the District Court should have treated, under its method of allocating the fund, as being in the first category for payment.

We argue, *infra* (Point IV), that even if it is assumed that the assignee is permitted a credit after Section 3466 became operative, the allowable credit in this case would be so small that the entire property of the debtor would be awarded to the United States.

debtor's assets had become dedicated to prior satisfaction of the taxes due the United States. The payment clearly could not properly be made since after that time a payment to anyone other than the United States violates the express direction of Section 3466. It follows that the State must turn over the amount paid to it to the United States as it has agreed to do if the assignee's payment was in disregard of the priority of the United States under Section 3466.[*] (R. 13.) Since the State is required to return what it received, no credit may be allowed for the assignee's payment to it. There is nothing in Section 902 to warrant, and its purpose forbids, the view that a credit is allowable for a payment to a State which must be refunded by the State. Cf. Article 211 (g) of Treasury Regulations 90, as amended by T. D. 5383, 1944 Cum. Bull. 560.

The only way in which the complete priority of the United States as to the entire property of

[*] The complaint filed by the United States (R. 1–4) was to enforce a personal liability against the assignee to the extent of $803.72 under Section 3467 of the Revised Statutes (Appendix, *infra*) which makes an assignee, who pays any debt before he "satisfies and pays" the debts due the United States from his assignor, answerable in his own person and estate, to the extent of the payment, for the unpaid debts due the United States. The return of the amount received by the State, which intervened in the proceeding, if the payment was not permitted by Section 3466, will release this liability of the assignee. The United States has limited its claim to $803.72, without cost or interest, by stipulation. (R. 20.)

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the debtor could be defeated in this case would be to read Section 902 as waiving, or creating an exception to, Section 3466 of the Revised Statutes.[9] The State's contention (Br. 26–27) that the assignee had an option under Section 902 as to 90% of the tax imposed by Section 901 to pay

[9] This point was not decided expressly by this Court in either of the two *Illinois* cases, but, as we show *infra*, the reasoning of the cases compels the view that the priority of the United States is not impaired to any extent by Section 902. In *Illinois* v. *United States*, 328 U. S. 8, the total of the debtor's property available for distribution to creditors was less than the federal capital stock tax and insurance contributions taxes combined, leaving out of consideration the unemployment compensation tax imposed by Section 901. The Supreme Court of Illinois had, however, decided that the debtor's trustee was not entitled to credit against the federal tax under Section 902 of the Social Security Act, as amended by Section 602 (a) of the Revenue Act of 1943, and had awarded all of the debtor's property to the United States to satisfy its claims. 391 Ill. 29, 35–37, 46. This Court affirmed the award, holding that all of the taxes due the United States preceded, in order of payment, the contributions due the State of Illinois under Section 3466. In *Illinois* v. *Campbell*, 329 U. S. 362, the assets available for distribution were slightly in excess of the Title VIII taxes due the United States. The Supreme Court of Illinois had awarded to the United States an amount sufficient to pay the Title VIII taxes in full, with interest, and, on the theory that the receiver was not precluded there from claiming a credit against the Title IX tax under Section 603 (b) of the Revenue Act of 1943, had given the balance to the State to be credited on the claim of the United States for Title IX taxes. 391 Ill. 29, 33–34, 46. Although the award to the State was believed to be erroneous, the United States did not petition for certiorari and that issue was not before this Court.

either the United States or the State [10] is in effect a contention that Section 902 relinquishes the priority of the United States as to 90% of the federal tax.

The language of Section 902 does not expressly surrender priority as to 90% or any other portion of the federal tax, and the State must therefore derive a waiver of Section 3466 to this extent by implication, if it is to prevail. While this Court has in a few instances implied that Congress intended to relinquish priority under Section 3466 as to certain debts due the United States, this was because later legislation dealing expressly with such debts was so inconsistent with Section 3466 as to compel the conclusion. See *Cook County Nat. Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; cf. also *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236. But as stated in *United States* v. *Emory*, 314 U. S. 423, 433, only the plainest inconsistency would warrant the finding of an implied exception to the operation of so clear a command as that of Section 3466. Cf. *United States* v. *Remund*, 330 U. S. 539, 544–545.

[10] Even considered alone, Section 902 can not be construed as granting such an option. It merely authorizes a credit against the federal tax in the exact amount paid to a state, if a taxpayer meets also the other conditions on which the credit is granted; the amount paid the State, and thus the credit, may actually be less than 90% of the federal tax. And until a credit is procured, the entire federal tax is payable.

There is no "plain inconsistency" between Section 3466 and Section 902. As pointed out in *Illinois* v. *United States*, 328 U. S. 8, 11-12, Section 3466 is one of the collection remedies which was intended by Congress to aid in the collection of the Title IX tax (see Section 905 (b) of the Social Security Act) and it is not inconsistent with the purposes or express language of the Social Security Act. This would seem to decide the matter insofar as Section 902 is concerned, particularly since the Court discussed its provisions in general terms (p. 10) in connection with the holding that the Social Security Act was consistent with the priority of the United States. In any event, it is plain that Section 902 is not inconsistent with Section 3466.

In the first place, the two statutes differ in the scope of their application. Section 902 is a general one, outlining broadly the conditions on which a credit will be allowable to taxpayers. It does not relate specifically to the case where a taxpayer has become insolvent, whereas Section 3466 operates exclusively in the latter field. The same situation exists in connection with the amendments to Section 902 which authorize a credit, regardless of the date of payment, if the taxpayer's assets were, within specified periods, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control

of, a court of competent jurisdiction.[11] Such fiduciaries may take possession of assets in a variety of situations, whether or not the owner may be solvent or insolvent. Thus the subject matter of the amendments is more general in scope and is not confined to the special situation where the taxpayer has become insolvent in the bankruptcy sense and has been divested of his assets in one of the ways specified by Section 3466.[12]

A general statute like Section 902 could hardly be the basis for an inference that Congress intended therein to waive the long standing priority of the United States given specifically by Section 3466 in certain situations. And, there is nothing in the legislative explanations in connection with the credit (fns. 4 and 12, *supra*) to

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[11] The removal of the time limitation for paying a State's claim made by these amendments apparently does not apply to a voluntary assignee at common law for the benefit of creditors, since he is not a fiduciary appointed by, or under the control, of a court.

[12] The committee reports in connection with Section 902 of the Social Security Act Amendments of 1939 and Section 602 of the Revenue Act of 1943 do not refer to Section 3466 and we find nothing to disclose a purpose to allow receivers and other fiduciaries to have a credit if payment to a State will violate the priority accorded by Section 3466 to the taxes and other debts due to the United States. See H. Rep. No. 728, 76th Cong., 1st Sess., pp. 64, 78 (1939–2 Cum. Bull. 538, 555, 564); S. Rep. No. 734, 76th Cong., 1st Sess., pp. 77, 90 (1939–2 Cum. Bull. 565, 582, 590–591); H. Rep. No. 871, 78th Cong., 1st Sess., pp. 73–75 (1944 Cum. Bull. 901, 956–957); S. Rep. No. 627, 78th Cong., 1st Sess., pp. 96–97 (1944 Cum. Bull. 973, 1043–1044).

induce the view that the opportunity to secure a credit under Section 902 was intended as a right paramount to the priority of the United States under Section 3466.

Furthermore, both Section 902 and Section 3466 can consistently be given effect according to their terms. The application of Section 3466 to the Title IX tax due the United States, whenever the circumstances necessary to its operation have been met, does not preclude the application of Section 902 at the same time to allow a credit according to its terms, if the taxpayer has complied or can comply with the conditions on which it is granted. Section 902, of course, does not grant a credit in any amount, even when Section 3466 is not called into force, as an absolute right. In many cases the fiduciary of an insolvent debtor will be able to procure a credit under Section 902 after Section 3466 has become effective. In circumstances where the debtor's property exceeds the aggregate of the debts due the United States, it may be possible after the right of priority in the United States has arisen, for a fiduciary under the control of a court to pay a State's claim for contributions wholly or in part out of the excess and thereby to secure a credit against the Title IX tax claimed by the United States.[13] The allow-

[13] This situation is illustrated by the hypothetical case posed by the District Court in its opinion (R. 15) and by the example mentioned in the State's brief (pp. 21–22). Thus, in a case where the insolvent with $200 worth of

ance of the credit in these circumstances, however, is not because Section 902 is deemed to be inconsistent with Section 3466, or because Section 3466 is demoted to a subordinate position by Section 902. On the contrary, the priority of the United States under that section is recognized and is given full effect, as is Section 902.

Similarly, both sections can operate according to their terms in cases like the present one where an insolvent debtor's assets are less than the taxes due the United States and all of them

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property, was indebted to the United States for Title IX tax of $100, to the State for contributions of $90, and to general creditors for $200, the proper distribution under Section 3466 very well might be $10 to the United States, $90 to the State, and $100 to general creditors. Whether it would be a proper distribution would depend on whether the fiduciary holding the debtor's assets was barred by the conditions of Section 902 as amended or by some state priority statute from paying the State and claiming a credit for the payment. If he was not barred from the credit, it would be possible for the fiduciary, after paying $100 to the United States, to pay $90 to the State; then to claim a credit for the $90 payment; and to secure a refund of the federal tax in that amount (Section 902 (d) of the Social Security Act Amendments of 1939 and Section 602 (c) of the Revenue Act of 1943). Because it would be possible to do these things, the order of distribution could very well cut through to the end result and award only 10% of the claim of the United States to it in the first instance. A similar distribution giving effect to the final result, might well be made in the State's example also, provided the State priority statute allowed payment of the State's claim for contributions immediately after payment of the federal tax and provided a credit under Section 902 was otherwise obtainable.

have under Section 3466 been hypothecated to the satisfaction, first, of the federal claims. Compliance with the condition precedent on which Section 902 has authorized a credit is then impossible, but the credit is denied not because Section 3466 operates to exclude Section 902 or to nullify it, but because the terms of Section 902 itself deny it where no payment can be made. As previously pointed out, Congress intended the full tax imposed by Section 901 to be collected by the United States, unless a credit against it had been secured under Section 902. *United States* v. *New York, supra.*

Furthermore, the priority of the United States under Section 3466 is absolute and all-inclusive in its terms, whereas there is no absolute right to a credit under Section 902. The very fact that the last section gives only a conditional right precludes the view that it was intended to waive the priority statute in any respect. The privilege of a credit upon qualification for it was given by Section 902 in the first instance as a matter of legislative grace and it could of course be withheld entirely in certain circumstances as the Congress indicated. Cf. *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46; *Helvering* v. *Ohio Leather Co.,* 317 U. S. 102. Thus, the termination of the opportunity to secure a credit by force of circumstances, where under Section 3466 all of a taxpayer's assets are required to satisfy debts due the United States and nothing remains

to pay the State, therefore can not be objectionable. As pointed out, Section 3466 itself does not preclude the credit, but even if the credit had been completely withdrawn when Section 3466 became effective, such action would have been proper. The operation of Section 3466, whatever its effect on other creditors, is justified as a measure necessary to assure the federal revenues.[14] *Spokane County* v. *United States*, 279 U. S. 80, 92; *Price v. United States*, 269 U. S. 492, 500; *United States* v. *State Bank of North Carolina*, 6 Pet. 29.

To uphold the contention that Section 902 impliedly revokes the federal priority as to 90%, or some, of the Title IX taxes would open the way to a further serious impairment of the federal priority. The States of course may establish relative priorities for the debts due to them or to other creditors and most States accord higher priorities to certain other claims than they do to social security taxes.[15] Thus, if the State's con-

[14] There is of course no basis for a view that the Title IX tax was not levied for revenue purposes. The tax imposed by Section 901 is a tax paid into the general fund of the Treasury as any other internal revenue collection and is not earmarked for any purpose. It is subject to appropriation for any federal purpose as is any other tax collected by the United States. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 574, 577–578, 585, 598; cf. *United States* v. *New York*, 315 U. S. 510, 517, and *Florida* v. *Mellon*, 273 U. S. 12, 14.

[15] This is true in Massachusetts. The unemployment compensation law effective January 1, 1937, provided that "Contribution payments and interest thereon or penalty assessed

tention here were accepted as the correct rule, the Federal Government might be forced to stand aside as to 90% of its Title IX claim on the theory that the federal tax could be reduced to that extent by credit for payment of a State's claim for contributions, yet it would be impossible for the fiduciary to pay the State's social security tax because under State law the insolvent debtor's assets were required to be used to satisfy different claims with higher priorities. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 91. The credit then could not be secured, with the result that the federal tax could not be reduced by a credit and could not be satisfied by payment, and would be subordinated to claims other than the State social security tax. This illustrates the potential dangers to the federal priority which are inherent in the State's position here. Certainly surrender of federal prior-

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in lieu thereof, shall have priority over all other claims against an employer, except tax and wage claims." Massachusetts General Laws (Ter. id.) c. 151A, Sec. 7, as amended by Massachusetts Acts, 1937, c. 421, Sec. 1. Massachusetts Acts, 1941, c. 685, Sec. 1, effective October 24, 1941, amending c. 151A, continued in Section 17 thereof the priority of contributions over all other claims except wage claims, but eliminated tax claims from the exception. While originally Massachusetts contributions were apparently not deemed to be taxes (*Howes Bros. Co.* v. *Unemployment Compensation Commission*, 296 Mass. 275, 281), it now is recognized that they are taxes (*Prop'rs Mt. Auburn* v. *Unemploy't Comp. Com.*, 301 Mass. 211, 212–213; *In re Berkshire Hardware Co.*, 39 F. Supp. 663 (Mass.)) and the change in the State pri-

ity as to a particular tax in favor of a particular claim of a State is not to be implied if as a consequence the federal priority may be impaired in other respects.

It seems equally plain that the priority of the taxes due the United States is not to be displaced on the theory that the maximum credit authorized by Section 902 should be allowed under equitable principles, even though it cannot be gained, because of insufficient assets, by actual payment to the State, as that section provides. See *Matter of White Plains Oil Corp.*, 287 N. Y. 141, 145–146. The terms of Section 902 afford no basis for allowing a credit on equitable grounds and of course Section 3466 itself is an exception to the equitable principle of marshaling assets.

The State's contention in this case of course is not confined to the assertion that the assignee may reduce the unemployment tax imposed by Section 901 by paying the State's claim even though such payment is precluded by the terms of Section 3466, but it takes the wholly unwarranted position that having paid the State, the assignee may apply the credit for the payment against the debtor's liability, not merely for the unemployment tax, but for any federal tax. Sec-

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ority statute may have been made to reflect this new concept of the nature of the contributions.

The unemployment compensation laws of every other State, with four exceptions, expressly provide that the contributions due thereunder are inferior, or rank equally, in priority with certain other claims. Cf. Wisconsin Statutes, 1945, Sec. 108.23, which has a unique provision.

tion 902 itself forbids this, since it authorizes credit in certain circumstances against the tax imposed by Section 901 only. Cf. *Illinois* v. *Campbell,* 329 U. S. 362, 367, fn. 5. Furthermore, to recognize the payment to the State as the basis for a credit, even against the Title IX tax only, results in defeating the priority of the United States to a large extent under the facts here. Not only would this have the effect of reducing the claim of the United States for Title IX taxes and leaving the reduced amount unsatisfied in its entirety but it would also deny priority in part to the United States for the other taxes due it. This is so because the amount left for the United States after payment of the State's claim was only $331.39, whereas the total of its claims for Title VIII and capital stock taxes alone, exclusive of interest, was $711.05. Thus, the result of allowing the State to retain the $803.72 paid to it is to elevate its claim to a position paramount to all of the taxes due the United States, contrary to Section 3466 and to *Illinois* v. *United States,* 328 U. S. 8.

The retention by the State of any part of the $803.72 paid to it is not to be justified on the theory that the payment to the State actually "paid" or "satisfied" the federal tax or taxes to that extent, as the State contends. (Br. 24, 25–26, 30–31.) *Illinois* v. *United States, supra,* has already decided that an *unpaid* State's claim

for contributions is not on a parity with either the Title VIII or Title IX tax for purposes of Section 3466, and it follows *a fortiori* that a payment to a State of its claim, after the priority of the United States has attached to all the debtor's assets, is not tantamount to a satisfaction of the Title IX tax due the United States for purposes of the priority statute.[16] If in the case which this Court affirmed on other grounds in *Illinois* v. *Campbell*, 329 U. S. 362, the award by the Supreme Court of Illinois to the State of Illinois of the balance (after payment of the Title VIII tax to the United States) with directions to credit it on the claim of the United States for unemployment compensation taxes (391 Ill. 29, 46; see fn. 9, *supra*) is construed as a holding that such payment to the state would "satisfy" the Title IX tax due to the United States within the meaning of Section 3466, we submit that the award to this extent is contrary to *Illinois* v. *United States, supra.*

The decision of the Circuit Court of Appeals in this case is completely supported by *Matter of*

[16] This is not to say of course, as we have previously indicated (*supra*), that the Title IX tax due the United States may not be reduced by a credit, prior to the incidence of the priority of the United States, and after the preference has attached if the insolvent debtor has sufficient assets so that his fiduciary may pay a state without violating Section 3466.

White Plains Oil Corp., supra. In that case upon substantially identical facts the Court of Appeals of New York sustained the priority of the United States in respect of all the taxes claimed by it, including the full amount of Title IX taxes imposed by Section 901, to the exclusion of the state's claim for contributions, even though it was apparent that if the debtor had remained solvent or if its assets had been in excess of the total taxes claimed by the United States, the federal claim for Title IX tax might have been reduced to 10% of the amount claimed. In other cases also, claims of the United States for taxes under Title IX of the Social Security Act have been accorded complete priority over claims of a state for unemployment compensation contributions. Thus, they are consistent with the decision below, although the priority of the United States was either conceded, or the contentions made here were not urged, or, if urged, were not discussed in the opinion. *United States* v. *Waddill Co.*, 323 U. S. 353; *In re Ever Krisp Food Products Co.*, 307 Mich. 182; *Lerman* v. *Lincoln Novelty Co.*, 130 N. J. Eq. 144; cf. *Parks* v. *Central Door & Lbr. Co.*, 164 Ore. 363, 378–381. Nothing in *United States* v. *New York*, 315 U. S. 510, supports the State's position, since the proceeding there was in bankruptcy in which taxes due by the bankrupt to the United States and the States

have equal priority under Section 64 (a) (4) of the Bankruptcy Act.[17]

IV

EVEN IF THE ASSIGNEE IS ENTITLED TO A CREDIT UNDER SECTION 902, THE UNITED STATES IS ENTITLED TO A RETURN OF THE AMOUNT PAID TO THE STATE

Although we believe we have conclusively demonstrated that the United States has a paramount claim to all of the debtor's property under Section 3466 to satisfy the taxes due it and that the assignee is not entitled to any credit against the tax imposed by Section 901 of the Social Security Act, nevertheless we shall assume *arguendo* here that a credit in some amount is possible and explore the questions as to the amount of the allowable credit and the proper distribution of the assets on this assumption.

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[17] *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, as modified 68 R. I. 358, was concerned with whether Section 3466 gave priority to a claim of the United States for Title VIII and capital stock taxes only, over the state's claim for unemployment contributions. No Title IX tax was involved, against which a credit could have been claimed. The court's conclusion apparently was that, after the taxes collected by the debtor-employer from its employees under both the state and federal laws as special funds in trust for the respective governments had been paid, Section 3466 gave priority both to the United States for its capital stock and Title VIII taxes and to the state for its unemployment contributions, over any other claims, the priority claims so determined to share *pro rata*. Insofar as this decision treats the state's claim as tantamount to a claim of the United States for purposes of Section 3466, it of course has no validity in view of *Illinois* v. *United States*, 328 U. S. 8.

Even on this assumption, it must be admitted that the State's claim is not equal in priority with the federal claims under Section 3466 (*Illinois* v. *United States,* 328 U. S. 8) and that any credit for payment to the State under the expressed limitation in Section 902 can at most apply against only the federal unemployment compensation tax. Hence, it follows that at least the federal taxes which are not subject to the credit and which therefore have absolute priority under Section 3466 are to be satisfied in their entirety to the exclusion of the State's claim. These are the liabilities for capital stock tax of $21, and for insurance contributions taxes of $690.05, which total $711.05, exclusive of interest. The interest allowed in the District Court's judgment (R. 12, 18) on these two claims was $92.06.[18] Deducting the taxes and interest totalling $803.11 from the available assets of $1,131.11, there remains only $328 to be distributed, by some formula, as between the priority claim of the United States for the 1938 unemployment tax of $963.08 and interest thereon, and the State's inferior

[18] The District Court's judgment of $610.27 in favor of the United States (R. 12) was composed of the following amounts (cf. R. 18); $21 capital stock tax plus $8.76, interest at 6% from the due date until the date of judgment; $690.05 insurance contributions tax less $331.39 previously received, with interest of $83.30 from the due date to the date of judgment; and $96.31 unemployment compensation tax plus $42.24 interest to the date of judgment.

claim of $803.72 for contributions for 1938 and 1939.

If it is assumed that the whole $328 is available in the first instance for purposes of obtaining a credit, which of course is contrary to the fact, the assignee could have credit for only that amount against the federal tax of $963.08. As pointed out, Section 902, as amended, allows credit only in the amount actually paid into a state fund, but limited to a maximum of 90% of the federal tax. Applying the assumed credit against the federal tax of $963.08, there would remain an unsatisfied federal tax due of $635.08, plus interest, against which no credit is possible, and this portion of the federal tax with interest, at least, has a status of absolute priority. *Illinois* v. *United States, supra.* But since the amount exceeds the $328 actually available to pay both it and the State's claim, it follows that the United States under its priority is entitled to take the remaining $328 to the exclusion of the State.

Thus, the maximum credit which the assignee would be able to apply against the federal unemployment tax, assuming *arguendo* that it is possible for him to become entitled to any credit on the facts here, would not be large enough to prevent distribution of all the debtor's assets to the United States to satisfy its claims for the taxes which are accorded priority by Section 3466 of the Revised Statutes.

Both the State (Br. 26–31), and the State of Illinois as amicus curiae (Br. 27–30), suggest three possible methods of allocating the available assets as between the United States and the State. Our previous argument shows that the United States is entitled to all of the debtor's property on any view which may be taken, and it follows that none of the three methods of allocation is proper. The first method, favored by the State (Br. 26–27, 30–31), would satisfy the State's claim in full, first, on the theory that the State tax is a part of the Title IX tax which the assignee elected to pay first.[19] This method, of course, ignores Section 3466 and the decisions in the two *Illinois* cases, *supra*. The third method, favored by the State of Illinois (its Br. 29–30), would allow the United States on its Title IX claim only 10% of the fund available for distribution (after payment of the capital stock and insurance contributions taxes, with interest), instead of 10% of the tax which is due, as allowed in the second suggested method and by the District Court. Assuming here, *arguendo* only, that a choice must be made between the second and third methods, it seems plain that the United States would be entitled to 10% of the unemploy-

[19] Since the State tax does not have the status of a federal tax, the question as to whether the assignee could elect under Section 3466 to pay a particular one of the debts due the United States does not arise in this case. Cf. *United States* v. *Cochran*, Fed. Cas. No. 14,821; *United States* v. *Amory*, Fed. Cas. No. 14,443.

ment tax due under its priority, since even if the maximum credit had been obtained, this amount would be absolutely due to the United States. Cf. *United States* v. *New York*, 315 U. S. 510, where in a bankruptcy proceeding, in which the taxes due the United States and the States have equal priority, the Court approved a method of computing the allowable credit, which assumed that the United States was entitled to receive 10% of the Title IX tax actually due, rather than only 10% of the amount available for distribution.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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HELEN R. CARLOSS,
LEE A. JACKSON,
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Special Assistants to the Attorney General.

DECEMBER 1947.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C., 1940 ed., Sec. 191.)

SEC. 3467 (as amended by Sec. 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680). Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C., 1940 ed., Sec. 192.)

Social Security Act, c. 531, 49 Stat. 620:

SEC. 901. On and after January 1, 1936, every employer (as defined in section 907)

shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (42 U. S. C., 1940 ed., Sec. 1101.)

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (42 U. S. C., 1940 ed., Sec. 1102.)

SEC. 905. * * *

(b) Not later than January 31, next following the close of the taxable year, each employer shall make a return of the tax under this title for such taxable year. Each such return shall be made under

oath, shall be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer, or, if he has no principal place of business in the United States, then with the collector at Baltimore, Maryland, and shall contain such information and be made in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as not inconsistent with this title, be applicable in respect of the tax imposed by this title. * * * (42 U. S. C., 1940 ed., Sec. 1105.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more. * * * (42 U. S. C., 1940 ed., Sec. 1107.)

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

SEC. 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment;

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

* * * * *

(c) The provisions of the Social Security Act in force prior to February 11, 1939 (except the provisions limiting the credit to amounts paid before the date of filing returns) shall apply to allowance of credit under subsections (a), (b), and (h), and the terms used in such subsections shall have the same meaning as when used in title IX of the Social Security Act prior to such date. The total credit allowable against the tax imposed by section 901 of such Act for the calendar years 1936, 1937, and 1938, respectively, shall not exceed 90 per centum of such tax.

(d) Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under subsections (a), (b), and (h), may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

* * * * *

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 602. CREDIT AGAINST FEDERAL UNEMPLOYMENT TAXES FOR YEARS 1936 TO 1942.

(a) *Allowance of credit against tax for 1936, 1937, and 1938.*—Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit (if credit is not allowable under section 902 of such Act) for the amount of contributions paid by him into an unemployment fund under a State law—

(1) Without regard to the date of payment, to the extent hereinafter provided in this subsection;

(2) Without regard to the date of payment, with respect to wages paid after September 19, 1939;

(3) Without regard to the date of payment, if the assets of the taxpayer were, at any time during the period August 11, 1939, to October 8, 1939, inclusive, or the period October 9, 1940, to December 6, 1940, inclusive, or the period September 21, 1941, to November 18, 1941, inclusive, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

The provisions of the Social Security Act in force prior to February 11, 1939 (except the provision limiting the credit to amounts paid before the date of filing returns), shall apply to allowance of credit under this subsection; except that the amount of credit against the tax for the calendar year 1936, 1937, or 1938, for contributions paid after December 6, 1940, shall not (unless the credit is allowable on

account of paragraph (2) or (3)) exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid before the last day upon which the taxpayer was required under section 905 of such Act to file a return for such year. The terms used in this subsection shall have the same meaning as when used in title IX of such Act prior to February 11, 1939. The total credit allowable against the tax imposed by section 901 of such Act for the calendar year 1936, 1937, or 1938 shall not exceed 90 per centum of such tax.

* * * * *

(c) *Refund, credit, or abatement.*—

(1) Refund or credit of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under this section, may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax (including statutes of limitations). No interest shall be allowed or paid on the amount of any such credit or refund.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 157

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION BY THE STATE OF ILLINOIS, AS AMICUS CURIAE, FOR LEAVE TO PARTICIPATE IN THE ORAL ARGUMENT OF SAID CAUSE.

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MOTION BY THE STATE OF ILLINOIS, AS AMICUS CURIAE, FOR LEAVE TO PARTICIPATE IN THE ORAL ARGUMENT OF SAID CAUSE.

And now comes the State of Illinois, as *amicus curiae*, by George F. Barrett, its Attorney General, and respectfully shows unto this Honorable Court the following:

1. That in 1946, upon petitions by the State of Illinois, this Court granted writs of *certiorari* in two cases entitled *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner* v. *United States, Respondent*, No. 749 of 1945, and *id.* v. *Nigel D. Campbell, Collector of Internal Revenue, Respondent*, No. 750 of 1945 and subsequently No. 35 of 1946.

2. That this Court's decisions in the said two *Gordon* cases above referred to (328 U. S. 8, and 329 U. S. 362) are the *principal* authorities upon which the Circuit Court of Appeals in the instant case based the decision which is here challenged by the Commonwealth of Massachusetts, and are likewise the *principal* authorities upon which the United States, as respondent, bases its argument in support of the said decision by the Circuit Court of Appeals.

3. That the State of Illinois is further concerned in the case now before this Honorable Court in that it now has pending and as yet undetermined in the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, two cases entitled *United States of America, Plaintiff* v. *P. C. Gartley Motors Co., et al., Defendants,* No. 44C 671; and *Robert C. Mitchell, assignee, etc., Plaintiff* v. *Carter H. Harrison, Collector of Internal Revenue, et al., Defendants,* No. 44C 716; which involve the same precise issue and have been continued generally pending the ruling of this Court in the instant case.

4. That, while the petition for a writ of *certiorari* was pending in the instant case, the State of Illinois, as *amicus curiae,* filed a brief in support of said petition; and that it has recently, as *amicus curiae,* filed a brief on the merits, copies of which briefs, together with copies of this motion for leave to argue orally, have been duly served upon the Attorney General of Massachusetts and upon the Solicitor General of the United States.

5. That counsel making this motion is of the opinion that this State's participation in the oral argument of the instant cause might assist this Court and might serve to clarify the issues before this Court in this litigation.

which will affect not only the Commonwealth of Massachusetts but every State in the Union since all States, including Illinois, have similar statutes and problems.

6. That the Attorney General of Massachusetts, attorney for the petitioner in the instant case, has agreed to allocate twenty (20) minutes of the hour to which it would otherwise be entitled to the State of Illinois for oral argument as *amicus curiae*, if such arrangement be sanctioned by this Court.

7. That the oral argument of the said cause has been tentatively set for the two-week term beginning December 8, 1947.

WHEREFORE, the State of Illinois prays for the entry of an order granting it leave to participate as *amicus curiae* in the oral argument of the above entitled cause and allocating to it twenty (20) minutes of the hour to which the petitioner would otherwise be entitled.

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Chicago 4, Illinois,
Attorney for Amicus Curiae.

ALBERT E. HALLETT,
Assistant Attorney General,
Of Counsel.

AFFIDAVIT.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

Albert E. Hallett, being first duly sworn, on his oath deposes and says that he is a member of the bar of this Court and Assistant Attorney General of the State of Illinois, that he has read the above and foregoing motion and that the matters and things therein set forth are true in substance and in fact.

Albert E. Hallett

Subscribed and sworn to before me this 17th day of November, A. D. 1947.

Pauline Jan Ross

A Notary Public in and for Cook County, Illinois.

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No. 157

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
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vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 265

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BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States:

This brief by the State of Illinois, as *amicus curiae*, is filed under the provisions of Rule 27 (9) of this Court. As will hereinafter more fully appear, the State of Illinois, by virtue of certain litigation in which it has already been and is now involved, is directly interested in having this Honorable Court grant the petition for a writ of *certiorari* in this case and adjudicate the important Federal question

of substance thereby presented in a full opinion, not by a mere formal denial of the writ, which would not constitute a decision on the merits (*United States* v. *Carver*, 260 U. S. 482).

THE OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts, entered on May 1, A. D. 1946, is officially reported at 65 Fed. Supp. 763.

The opinion of the Circuit Court of Appeals for the First Circuit, entered on April 2, A. D. 1947, is officially reported at 160 Fed. (2d) 614.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code (28 U. S. C. A. 347) as amended.

It is hereinafter contended that special reasons, of sufficient importance to justify this court in the exercise of its sound judicial discretion in granting the writ, exist in the instant case, within the purview of Rule 38 (5) (b), which reasons are as follows:

I.

The Circuit Court of Appeals Has, in the Instant Case, Decided a Federal Question of Substance Which Has Not Been But Should Be Precisely Settled by This Court Because of Its Great Importance, Not Only to the Federal Government But to Each of the Forty-eight States Enacting Unemployment Compensation Statutes as Integral Parts of the Nationwide Program Established Under the Social Security Act and Related Legislation.

This reason is fully developed under Point I of our argument, *post*, pp. 6-9.

II.

The Circuit Court of Appeals Has, in the Instant Case, Decided an Important Federal Question of Substance in a Way Probably in Conflict with the Applicable Decisions of This Court and with the Intent of Congress as Manifested in the Social Security Act and Related Legislation.

This reason is fully developed under Point II of our argument, *post*, pp. 9-31.

CONCISE STATEMENT OF THE CASE.

The facts in this case, which are not in dispute, may be concisely stated as follows:

The Somerville Sales & Service, Inc., being insolvent, in 1939 made a common law assignment for the benefit of its creditors. The Commissioner of Internal Revenue filed with the assignee a claim against the assignor for 1938 Federal unemployment taxes under Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 Federal insurance contribution taxes under Title VIII of the said Act in the sum of $690.05 and for 1939 Federal capital stock taxes in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for State unemployment taxes under the Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions due it for the years 1938 and 1939. On October 6, 1939, the assignee paid, out of the sum of $1,135.11 which he had realized from the sale of the debtor's assets, the sum of $803.72 in full payment

of the claim of the Commonwealth of Massachusetts and the remainder of $331.39 be paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII due for 1938 and there remained unpaid the sum of $1,342.74 with interest. Massachusetts has agreed to pay over the above-mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under R. S. 3466, and the United States has agreed that it prevails the judgment shall be limited to $803.72.

On these facts, the District Court, on May 1, 1946, held that the United States had priority for the full amount of its capital stock and Title VIII taxes and for 10% of the amount of its Title IX taxes, but that it could not recover the remaining 90% of said tax on the ground that the taxpayer or his assignee had the alternative right to pay 90% of his obligation under Title IX to an approved State unemployment fund (65 Fed. Supp. 763).

On appeal and cross-appeal, the Circuit Court of Appeals for the First Circuit, on April 2, 1947, affirmed the judgment of the District Court as to capital stock and Title VIII taxes but reversed as to Title IX taxes, holding, in substance, that the taxpayer's assignee had no alternative right to pay any part of the Title IX taxes to a State unemployment fund and that the United States had priority, under R. S. 3466, for the **full** amount of capital stock taxes, Title VIII taxes **and** Title IX taxes (160 Fed. (2d) 614).

The present petition by the Commonwealth of Massachusetts for a writ of *certiorari* seeks to reverse the decision last above described.

The Federal question of substance, which is presented by the petition in the instant case, **may be precisely stated as follows:**

Where a taxpayer, owing Federal capital stock, Title VIII and Title IX taxes and State unemployment taxes, becomes insolvent and makes an assignment for the benefit of his creditors, and his assignee pays in full all capital stock and Title VIII taxes with interest—

May the Federal government's right to priority of payment, insofar as Title IX taxes are concerned, be "satisfied" within the meaning of R. S. 3466, by the payment of only 10% of the face amount of said tax directly to the Federal government and the payment of the balance to an approved State unemployment fund (as the taxpayer could himself have done had he remained solvent), as the District Court, in effect, held?

Or

Does R. S. 3466 require that the State's normal 90% share in the face amount of said Title IX taxes (which is used by the States only to pay actual benefits to unemployed workers) be forfeited in its entirety to the Federal government (which pays no unemployment benefits and, but for the taxpayer's intervening insolvency, would have been entitled only to 10% of the face amount of such taxes to defray its administrative costs), as the Circuit Court of Appeals, in effect, held?

ARGUMENT.

I.

The Circuit Court of Appeals Has, in the Instant Case, Decided a Federal Question of Substance Which Has Not Been But Should Be Precisely Settled by This Court Because of Its Great Importance, Not Only to the Federal Government But to Each of the Forty-eight States Enacting Unemployment Compensation Statutes as Integral Parts of the Nationwide Program Established Under the Social Security Act and Related Legislation.

On May 23, 1945, the Supreme Court of Illinois, in the consolidated cases of *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *Advertising Review Publishing Company, et al.—(United States of America, Appellant)*, No. 28490, and *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *The Chicago Waste & Textile Company, et al.—(Carter H. Harrison, Collector of Internal Revenue, Appellant)*, No. 28474, reported at 391 Ill. 29, held, in substance, that under Section 3466 of the Revised Statutes, the United States was entitled to priority on that portion of its claim which was for Federal insurance contributions (under Title VIII of the Social Security Act) plus interest, and that any balance thereafter remaining should be paid to the Director of Labor of the State of Illinois and credited against the claim of the United States for Federal unemployment taxes (under Title IX).

In 1946, upon petitions by the State of Illinois, this Court granted writs of *certiorari* to review said decisions, the *Advertising Review* case (No. 28490) becoming, in this

court, *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner,* v. *United States of America, Respondent,* No. 749 of 1945; and the *Chicago Waste & Textile* case becoming *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner,* v. *Nigel D. Campbell, Collector of Internal Revenue, Respondent,* No. 750 of 1945 and later No. 35 of 1946.

In said No. 749 (*Gordon* v. *United States*), this State, in brief, contended:

1—That, because of the intent of Congress as manifested in the Social Security Act and related legislation, Section 3466 of the Revised Statutes did not apply to give the United States priority for Social Security and capital stock taxes over the claims of a State for unemployment compensation contributions.

2—That the claim of the State for unemployment compensation contributions was a secured claim and was therefore entitled to priority over the unsecured claims of the United States for Social Security and capital stock taxes.

On April 22, 1946, this Court, in said No. 749 (*Gordon* v. *United States*, 328 U. S. 8), *held* that the provisions of the Social Security Act and related Federal legislation did *not* evince an intent on the part of congress to amend R. S. 3466 by making its provisions inapplicable as against state unemployment compensation contributions, and *affirmed* the ruling of the Illinois Supreme Court. *Actually* no issue as to Federal unemployment (Title IX) taxes was involved.

In said No. 750 (*Gordon* v. *Campbell*) (later No. 35 of 1946), this State, in brief, contended:

1—Same as No. 1 in No. 749 (above).

2—That the debtor was not insolvent within the meaning of Section 3466 of the Revised Statutes.

3—That the State's lien for unemployment compensation contributions was so specific and so far perfected as

effectually to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal government's access to such funds.

4—Same as No. 2 in No. 749 (above).

On December 23, 1946, this Court in said No. 750 (*Gordon* v. *Campbell,* 329 U. S. 362), which had by then become No. 35 of the October 1946 term, after pointing out that the earlier decision in No. 749 controlled the same issues in the latter case, *further held* that the debtor was insolvent within the meaning of Section 3466 and that the lien of the State of Illinois was not sufficiently specific or perfected to defeat the Federal government's priority under Section 3466, and *affirmed* the ruling of the Illinois Supreme Court. Again, the issue did *not* involve Federal unemployment (Title IX) taxes.

The decisions of this Court in these two *Gordon* cases are the decisions upon which the Circuit Court of Appeals for the First Circuit relies most heavily in the decision which the Commonwealth of Massachusetts here seeks to reverse by the instant petition for *certiorari.*

Apparently because of the relatively small amounts involved, the Federal government failed to file its own cross-petitions for *certiorari* in these two *Gordon* cases, thereby *precluding* this Court from reaching or passing upon the *further* question whether the Supreme Court of Illinois had erred in holding that, after the Federal government had been paid its Federal insurance contributions (under Title VIII), the balance then remaining should be paid to the State Director of Labor and credited against the claim of the United States for Federal unemployment taxes (under Title IX), substantially as Massachusetts now contends in the case now at bar.

Thus, in these two *Gordon* cases, this Court did *not* pass upon or settle the question now presented by the peti-

tion for *certiorari* in this instant case. So far as we are advised, this Court has not, until the filing of the petition in the instant case, had an opportunity to pass upon or settle the precise but nevertheless extremely important Federal question of substance here presented.

That the Federal question here presented to this Court for the first time is not purely academic or abstract is evidenced, at least in part, by the fact that the State of Illinois has, at the present time, pending and undetermined in the Federal District Court for the Northern District of Illinois, Eastern Division, at Chicago, two cases entitled *United States of America, plaintiff*, v. *P. C. Gartley Motors Company, et alia, defendants*, No. 44-C-671; and *Robert G. Mitchell, assignee, etc., plaintiff*, v. *Carter H. Harrison, Collector, et al., defendants*, No. 44-C-716, which involve this same precise issue and have been continued generally pending the ruling of this Court upon the petition for a writ of *certiorari* in this instant case.

In view of these considerations, we most respectfully submit that the petition of the Commonwealth of Massachusetts for a writ of *certiorari* in the instant case should be allowed on the ground (Rule 38 (5) (b)) that the Circuit Court of Appeals has, in the instant case, decided a Federal question of substance which has not been but should be precisely settled by this court because of its great importance, not only to the Federal government but to each of the forty-eight states enacting unemployment compensation statutes as integral parts of the nationwide program established under the Social Security Act and related legislation.

II.

The Circuit Court of Appeals Has, in the Instant Case, Decided an Important Federal Question of Substance in a Way Probably in Conflict with the Applicable Decisions of This Court and with the Intent of Congress as Manifested in the Social Security Act and Related Legislation.

Any discussion of this subject must take cognizance of the history and operation of this social legislation which clearly indicates the close integration and inter-relationships between the Federal and State measures to combat the evils of unemployment.

The critical conditions which give rise to a national program of unemployment insurance have been graphically described by this Court in *Steward Machine Company* v. *Davis*, 301 U. S. 548, which involved the constitutionality of Title IX; where this Court, at pages 586-588, declared:

> "• • • there is need to remind ourselves of facts as to the problem of unemployment • • •. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than ten million; at times a peak was attained of sixteen million or more. Disaster to the breadwinner meant disaster to dependents. • • • The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66. *Helvering* v. *Davis*, decided herewith, *post*, p. 619. The nation responded to the call of the distressed. Between Janu-

> ary 1, 1933 and July 1, 1936, the states * * * incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. * * * Insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the government of the nation."

In *Helvering* v. *Davis*, 301 U. S. 619, which involved an attack upon the constitutionality of Titles II and VIII of the Social Security Act (Old Age Benefits), this Court, at page 641, stated:

> "* * * The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state. The hinterland now settled that in pioneer days gave an avenue of escape. * * * Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest. * * *"

The national scope of the problem of unemployment was stressed by the President of the United States in his message to Congress on June 8, 1934,[1] wherein he declared:

> "We are compelled to employ the active interests of the nation as a whole through government in order

[1] Cong. Rec., Vol. 78, Pt. 10, p. 10770.

> to encourage a greater security for each individual who composes it. * * * If, as our Constitution tells us, the Federal government was established, among other things, 'to promote the general welfare' it is our plain duty to provide for that security upon which welfare depends. * * *"

Both branches of Congress emphasized that unemployment relief posed the most serious question for the nation.[2]

It was a problem nation-wide in scope which could not be combatted by the States acting individually. Moreover, most States were reluctant to enact unemployment compensation legislation for fear of imposing the additional burden of taxation entailed upon their already depressed industries, thus placing their industries at a disadvantage in competing with industries of States which had no such legislation.

To cope with the problem of unemployment, Congress enacted Titles III, VII and IX of the Social Security Act.[3] Briefly, Title IX levied a uniform pay roll tax on employers of eight or more throughout the nation. **The Federal Statute**, however, is not of itself a complete unemployment compensation law; it provides pay roll taxes but **makes no provision for the payment of unemployment compensation to unemployed workers, leaving that function to the States.**

It is obvious that a mere plan for taxation would not solve the problem which faced Congress and the nation. The heart of any plan to remedy the evil of unemployment is the stabilization of employment and **the payments of benefits to unemployed workers to cushion and thereby prevent the cumulative effects of loss of income.** This vital function, under the Federal plan, was to be carried on

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[2] Senate Report No. 628, 74th Congress, 1st Session, p. 10; House Report No. 615, 74th Congress, 1st Session, p. 7.

[3] Chap. 531, 49 Stat. 620.

by the States in the systems which the Federal Act sought to stimulate.

The Federal plan was simply this: As most States were hesitant to set up unemployment compensation systems because of the disadvantage it would impose upon their industries in interstate competition, the Federal plan levied a tax on employers of all States, and then proceeded to allow an offset credit up to 90 per cent of the Federal tax to those employers who contributed to State unemployment compensation funds. The combination of the nation-wide tax and the offset credit for amounts paid into State funds thereby equalized the burden on all industries. Since employers of all States were obliged to pay the Federal pay roll tax, and yet the Federal Government paid no benefits to workers, the plan of the Federal legislation both removed the fear of disadvantage in interstate competition and offered an inducement to the States to set up approved unemployment compensation systems whereby the State employers could obtain the offset credit and the State workers could obtain benefits in the event of unemployment.

Further to encourage the States to establish unemployment compensation systems, Congress, in Title III of the Social Security Act, provided for grants to cover the administrative costs of such systems. The funds for such grants are appropriated by Congress from the 10 per cent of the Federal tax which the government retains for the purpose of meeting the costs of administering the State unemployment compensation systems. However, as in Title IX, the State unemployment compensation laws are required to meet certain minimum criteria.

As stated by the President in his message to Congress on January 17, 1935,[4] sponsoring the Federal law:

[4] Cong. Rec., Vol. 79, Pt. 1, p. 546.

"With respect to Unemployment Compensation, I have concluded that the most practical proposal is the levying of a uniform Federal pay roll tax, 90 per cent of which should be allowed as an offset to employers contributing under a State Unemployment Compensation Act. The purpose of this is to afford a requirement of a reasonable uniform character for all states cooperating with the Federal Government, and *to promote and encourage the passage of unemployment compensation laws in the states.* The ten per cent offset should be used to cover the cost of Federal and State administration of this broad system." (Emphasis added.)

The 90 per cent credit provision in the Federal law was designed to encourage the passage of State unemployment compensation laws which would provide the actual protection against unemployment by the payment of benefits. It provides that each employer may reduce his Federal tax up to 90 per cent by the amount he has contributed to a State unemployment compensation fund.

The Federal tax being 3 per cent of the pay roll, practically all States enacted legislation calling for a standard tax of 2.7 per cent of the pay roll of employers subject to the scope of their legislation, the 2.7 per cent rate being equivalent of 90 per cent of the Federal tax. Thus an employer paying the full State tax and offsetting this amount against his Federal tax paid no more than if he had paid the full Federal tax to the Federal government, yet the amount he paid to the State went into the funds which actually operated as the protective device against the menace of unemployment.

Under normal conditions where the employer is solvent, the credit provisions operate as follows:

If an Illinois employer had a taxable pay roll in the amount of $100,000 in the year 1938, it would have had a Federal tax (without deducting the offset credit) of

$3,000. Contributions to the State of Illinois at the rate of 2.7 per cent would amount to $2,700. If the employer paid the State, he would be able to credit the State payments against the Federal tax to the extent of 90 per cent of the latter. Since the amount of $2,700 is exactly 90 per cent of $3,000, the amount of the Federal tax, the employer would be entitled to offset the full amount of the payment to the State against the Federal tax and the amount actually due the Federal government would have been $300, rather than $3,000.

The plain purpose of the credit is to build up an adequate fund through the payment of contributions into the State unemployment compensation systems through which the fundamental purpose of the entire legislation would be effected. Clearly, Congress was not concerned with Federal revenue in this measure, for the credit provision clearly indicates that 90 per cent of the tax was never intended to flow into the Federal revenue. That 90 per cent was a lever to pressure the States into enacting unemployment compensation systems necessary to fulfill the end sought by the Social Security Legislation. It must be borne in mind that the Federal government paid no benefits and the success of the plan to combat unemployment depended on the State systems which insured the worker against loss of income in the event of unemployment.

That these principles were uppermost in the mind of Congress in extending the credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.[1] Moreover, Congress believed that the general welfare of the country would be better served by the payment of contributions into State unemployment compensation funds than by the payment of the tax to the Federal government. *Steward Machine Company* v. *Davis, supra,* p. 589.

[1] Senate Report No. 628, 74th Congress, 1st Session, p. 15; House Report No. 615, 74th Congress, 1st Session, p. 16.

Under Title IX, the 90 per cent credit may be taken when the State has been paid on or before the last day on which the employer is required to file its yearly Federal return, i.e., February 1 of the following year. However, if the payment was made to the State after February 1, but on or before the following June 30, a credit of 81 per cent was permitted against the Federal tax. This reduction in the amount of credit allowed after February 1 provided an inducement to employers to make prompt payment to the States.

Further evidence in Title IX that Congress was primarily interested in building up the State funds lies in the removal of the time limitation for the obtaining of the full 90 per cent credit in those cases where the assets of the employer are in the hands of a court of competent jurisdiction at any time between the due date and the following June 30.

Nor is it only in Title IX that Congress has evidenced its intent to build up State funds, for time and time again Congress has demonstrated that it is the payment of contributions to the States which advances the purposes of the Federal government. Although the credit against the Federal tax was originally allowed only if contributions to State funds were paid within a specified period of time, Congress has repeatedly amended Title IX so as to extend the credit to taxpayers who are delinquent in the payment of contributions, in order to induce them to pay their contributions to the States.[6]

In the second Revenue Act of 1940, Congress waived the time for obtaining credit against the Federal tax in the case of any taxpayer who was delinquent in his 1936, 1937, 1938, or 1939 contributions to a State fund. Such taxpayers

[6] Section 1601, Internal Revenue Act of 1939; Section 701, Second Revenue Act of 1940; Section 701, Revenue Act of 1941; Section 602, Revenue Act of 1943.

were allowed the full 90 per cent credit if they paid their 1936, 1937, or 1938 contributions to their own State before December 6, 1940. As to the 1939 contributions, the credit was limited to 81 per cent of the Federal tax, except that the full 90 per cent credit could be taken regardless of the date when paid to a State fund, in those cases where the assets of the taxpayer were in the control of a receiver appointed by or under the control of a court in the period subsequent to the passage of the Act and December 6, 1940.

In the same Act, another special exception is made where contributions have been paid by mistake to the wrong State. In such case, payment under the proper State law is considered to have been made on the date of the erroneous payment, for the purposes of credit against the Federal tax.

The Revenue Act of 1941 continued the policy of encouraging the payment of delinquent contributions to the State by allowing full credit against the Federal tax for the payment of State taxes for 1936, 1937, and 1938, and by allowing a credit of 81 per cent for the payment of 1939 and 1940 State unemployment compensation contributions.

Finally, in the Revenue Act of 1943 (Section 602, Public Law 235, enacted February 25, 1944) Congress extended the 81 per cent credit offset for the payment of delinquent taxes for any year, **regardless of the date of payment of State contributions.**

It is to be stressed that in the absence of these foregoing enactments waiving the time limitations, the Federal government would have been entitled to the full three per cent, **regardless of whether or not the State was paid.** Yet the Federal government has repeatedly foregone the collection of taxes **actually due to it** in order to induce payment of contributions into State funds. It is apparent that Congress intended the Federal government should

receive only 3/10 of one per cent and that the additional amount which it continually waived in favor of the payment into State funds was the device whereby taxpayers would be induced to pay their State contributions.

Thus by the numerous exceptions extending the time for credit, Congress has clearly indicated that its prime concern is in the building up of State funds for the payment of unemployment benefits. **Any doubt that Congress did not consider this as a source of revenue for the Federal government is resolved by the 1937 Act of Congress[7] wherein Congress authorized an appropriation in excess of $20,000,000.00 to this State's unemployment compensation fund. This represented 90 per cent of the taxes which the Federal government had collected from Illinois employers prior to the enactment of the Illinois Unemployment Compensation Act.**

The intention of Congress to achieve the purposes for which Title IX was enacted, through the payment of contributions into State unemployment compensation systems, is strikingly revealed in this action, which was part of legislation which turned back 90 per cent of the taxes collected from employers prior to the enactment of State systems into the State unemployment compensation systems which had been established subsequent to the initial payments of taxes under Title IX. Nothing could demonstrate more clearly the Congressional intent that the State should receive 90 per cent of the amount due the Federal government under Title IX.

Further illustration of the interest of Congress in this measure as part of a plan to stabilize employment and not as a revenue source is disclosed in its willingness to allow the taxpayer to offset against the Federal tax the credit which he has received against State contributions under

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[7] Public Act 353, Ch. 755, 50 Stat. 754; Second Deficiency Appropriation Act of 1938, Ch. 681, 52 Stat. 1148.

a State plan of experience rating. Ordinarily, where the Federal tax is 3 per cent of the pay roll and the State tax is 2.7 per cent, contributions paid into the State fund equal 90 per cent of the Federal tax and the entire credit is obtained.

However, under the "experience rating" provisions of the Illinois Unemployment Compensation Act and of the Acts of other States, employers may pay contributions at a lower rate; in Illinois as low as 5/10 of one per cent. Thus, employers who have a stable employment record are required to pay contributions which amount to considerably less than 90 per cent of the Federal tax. This experience-rating plan by the reward of a lower rate is intended to induce employers to stabilize their employment, and so, if the employer were allowed to credit against the Federal tax only what he **actually** paid into the State fund, his total tax would remain the same and the inducement would fail of its purpose. Consequently, to avoid disappointing this incentive, the Federal law[8] permits the taxpayer, in addition to the credit for the amount actually paid to the State funds, to take a further credit equal to he difference between the amount of State contributions which he would have had to pay, had he not secured the reduced rate, and the amount that he actually paid to the State. In other words, the additional credit equals the amount of the reduction in the State tax.

This provision illustrates quite clearly the obvious intention of Congress that the United States was to receive only .3 of one per cent and that Congress was willing to offset against the Federal tax not only the actual amounts paid into State funds but also the credits allowed by the States under approved experience rating plans.

[8] Title IX, Social Security Act, 1937; Section 1602, Internal Revenue Code, 1939.

There is still further proof, if need be, of the deep concern which Congress has manifested in the maintenance and growth of State unemployment compensation funds. Congress has fully recognized that such funds would play a major role during the period of post-war readjustment and would serve as the first line of defense for the millions of workers employed in war industries who would be laid off and unemployed during industry's reconversion and readjustment to peace-time production. The Senate and the House appointed Special Committees on Post-War Economic Policy and Planning, which held extensive hearings on the problem of unemployment compensation in the post-war period.[9] Interviews with representatives of important government and private agencies on post-war problems and plans disclosed that "The fear of unemployment after the war colors the thinking of all the agencies interviewed. Those concerned with the labor problems give it first rank in their planning."[10] As a result of the recommendations of the said Special Committees on Post-War Economic Policy and Planning,[11] Congress enacted legislation guaranteeing the solvency of State unemployment compensation funds. The War Mobilization and Reconversion Act (Title XII)[12] authorizes loans to the several States for the purpose of bolstering State unemployment funds.

From the foregoing it is evident that Congress never contemplated that the full three per cent would be paid to the Federal government, as the United States will perhaps contend. The primary concern of the Federal legislation

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[9] Hearings before the Special Committee on Post-War Economic Policy and Planning, United States Senate, 78th Congress, Second Session, Pt. 3, Unemployment Compensation; Hearings before the Special Committee on Post-War Economic Policy and Planning, House of Representatives, 78th Congress, 2nd Session, Pts. 2 and 3, Economic Problems of the Transition Period.

[10] Senate Document No. 106, 78th Congress, 1st Session, p. 79.

[11] Senate Report No. 539, Pt. 5, 78th Congress, 2nd Session, p. 6; House Report No. 1855, 78th Congress, 2nd Session, pp. 27-28.

[12] 50 U. S. C. A. App. 1667, Senate Report No. 565, 79th Congress, 1st Session, p. 2.

was not in revenue to build up the Federal treasury, but on the contrary to force the accumulation of State funds for the payment of benefits. It is apparent that Title IX was intended to collect a Federal tax sufficient only to enable the United States, through the Social Security Board, to provide for the administration of State unemployment compensation systems. Any accrual to the general revenue has been incidental and was not contemplated. The tax collected has been more than ample to meet the need.[13]

To refuse to recognize that payment to the State would be applicable against the Federal tax under the offset provisions of the Federal legislation would deprive the State of funds needed to pay benefits, thereby defeating the patent intent of Congress. **It must be emphasized that the employees of a delinquent insolvent employer must be paid benefits under Illinois law if they are otherwise eligible, regardless of whether or not the State collects the corresponding contributions from the employer.** Congress, by the numerous exceptions and extensions, has evidenced that it considers payment into the State funds as more important to the fundamental purpose of social security than payment into the Federal treasury.

Section 3466 of the Revenue Code does not enter into this consideration for there is no question of priorities in the State's contention. It is simply a question of the intention of Congress—whether Congress intended that the

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[13] On June 7, 1944, in hearings before the subcommittee of the Committee on Appropriations, United States Senate, 78th Congress, second session on H. R. 4899, Chairman of the Social Security Board Altmeyer, at Page 39 of the hearings report, stated:

"That is another phase, I think that should be borne in mind. The Federal Government gets three-tenths of one per cent of the three per cent unemployment compensation tax which is levied by the Federal Government. That three-tenths of one per cent has been $450,000,000 in excess of the annual appropriations that Congress has made to the various States for the administration of The Unemployment Compensation Act. So at the present time the Federal Government $450,000,000 ahead."

Federal tax could be satisfied by payment into a State fund. The question must be answered in the affirmative.

The same conclusion was reached by the United States District Court in the case here at bar, where the Court stated (65 F. Supp. 763):

> "The question, nicely analyzed, seemed to me to be one not of priority but of alternative obligation.
>
> "The force of that analysis seemed to me to be more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548 was stressed. *As to 90 per cent of the taxes under that Title the objective of Congress was not to collect Federal revenues but to stimulate the creation of and payment to State unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under State unemployment compensation plans.*
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> "The correctness of the foregoing reasoning seemed to me to be proved by a suppositious case. Suppose A, an insolvent, with $200 in assets, owed $100 to the United States for 1938 Title IX taxes, 90 to Massachusetts for 1938 unemployment compensation contributions and $200 to general creditors. Can it be supposed that a court that was sensitive to the principle of marshalling assets would distribute the assets so that the United States received the first $100, Massachusetts the second $90, and the general creditors $10? To do that would give the two governments more than Congress contemplated and restrict the general creditors to 5 cents on the dollar. Would not a court that was mindful of the strict legal rights of the two governments, of the policies declared in their legislation and of the rights of the general creditors to be subject to no greater priorities than those governmental rights and policies require, distribute $10 to the United States, $90 to Massachusetts, and $100 or 50 cents on the dollar to the general creditors? *This would allow the two governments to receive all that they claimed from*

the insolvent before his insolvency and would follow the rules of priority established by R.S. § 3466." (Emphasis added.)

Even if one does consider Section 3466 in connection with the matter, the State's contention is not inconsistent with the priorities established by that provision. Section 3466 requires that debts due the United States "be first satisfied." The statute does not say and does not mean that a debt in all cases must be fully paid in cash. For example, the debt may be compromised,[14] and property may be received in payment.[15] The word "satisfied" clearly expresses this thought. An accord and "satisfaction" has long been a recognized means of discharging a debt.

Any construction that the Federal government must be paid the full three per cent in cash first, would lead to absurd situations. Assume for the purpose of illustration that the debtor owed the sum of $10,000.00 to the United States for Federal Unemployment Tax, and that he owed the State $9,000.00 for unemployment contributions. Assume further that there is available for distribution the amount of $10,500.00. Yet, if as may be argued by the government, the full amount must first be paid to the Federal government in cash, with no allowance for the offset credit, an absurd situation results. In such case the Federal government would receive the full $10,000.00 and $500.00 would remain for the State. However, the debtor could then obtain a refund from the Federal government because of the $500.00 payment to the State on the basis of the offset credit. The $500.00 refunded by the Federal government then would be applied to the balance owing to the State and thus in turn qualify the debtor's estate for a refund from the Federal government for this second $500.00 paid to the

[14] Revised Statutes, Section 3469, 31 U. S. C. A. 194; Internal Revenue Code Section 3761.

[15] Op. Atty. Gen. 298.

State. This process could be repeated until the State had been paid the full amount of $9,000.00 and the Federal government retained the amount of $1,000.00, **which was all that Congress intended the Federal government should get where a State system had been set up.** And certainly Congress never intended that such circuitous process would have to be resorted to in order for the State to obtain the contributions Congress intended it to have.

Thus, in the foregoing case, if the debtor had remained solvent, the State would have received $9,000.00 and the United States $1,000. The same result would follow even though the debtor became insolvent, but the assets were $10,001 or more. This ultimate result would certainly be in accord with the expressed intention of Congress. But if the assets amounted to $10,000 exactly or less, the interpretation that the Federal government must be paid its three per cent in cash without allowance for the offset credit would give the Federal government a windfall of $9,000, at the expense of the State unemployment compensation funds. Such a result would certainly distort the end sought to be accomplished by this legislation. The additional 90 per cent, never contemplated by Congress as revenue but intended more or less as a penalty to prod the States to create unemployment compensation systems, would be converted into a penalty on the State which had so created a system at the prompting of Congress. For, as pointed out, the State has assumed the obligation of paying benefits to the former employees of the employer regardless of whether or not it has collected the corresponding contributions from the employer.

The United States government, in support of its contention that it should receive the full 3 per cent Federal Unemployment Tax, will no doubt rely upon this Court's decisions in *People ex rel Gordon* v. *Campbell,* 329 U. S. 362, and *People ex rel Gordon* v. *United States,* 328 U. S. 8.

Those cases are not controlling on this issue, for, as we have already pointed out, the statements concerning priorities with regard to Title IX taxes are *dicta*. The facts and issues in these two *Gordon* cases were such that it was merely a question as to the relative status of State contributions and taxes under Title VIII.

But it will no doubt be asserted that the legislation under Title VIII and Title IX are so closely related that the reasoning of the Supreme Court is decisive on issues arising under Title IX as well as Title VIII.

It is true that both Titles are designed to promote the economic security of the worker. Title VIII is directed against insecurity caused by loss of income resulting from the incapacities of old age. Loss of income due to the recurrent periods of individual unemployment and to mass cyclical unemployment is sought to be corrected in Title IX.

But however related the purposes for which Titles VIII and IX were enacted, the means used to achieve that result are different. **Under Title VIII, the Federal government has undertaken the payment of old age benefits. Under Title IX, the Federal government does not pay benefits to unemployed workers; that is undertaken by the States** and the offset credit of 90 per cent of the Federal tax is considered as the means of inducing the establishment of State systems. **There is no offset allowance against taxes for Federal Old Age and Survivors' Insurance under Title VIII**; for these funds are needed for the financing of the benefit payments under Title VIII. There is the allowance of the offset credit under Title IX because the Federal government pays no unemployment benefits and those funds paid into the State systems are accomplishing the Federal purpose. Thus, this Court could say, as it did in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, that the needs of the Federal treasury could be cared for as well by the payment

of unemployment compensation contributions to the States as by payment of taxes to the United States.

Thus, although both Title VIII and Title IX have the same end in view, economic security for workers, **the means used to achieve that purpose are divergent.** In the one, the whole tax was intended to be collected as revenue for the financing of benefits to be paid by the Federal government. In the other, only 10 per cent was intended to come into the Federal treasury, and the rest was to be channelled into State unemployment compensation funds, there to be used in the payment of benefits.

Nor, as has been pointed out, is there a question of priorities. The question is solely whether Congress intended that the Federal claim for unemployment taxes could be "satisfied" by the offset credit for funds paid into State unemployment compensation funds. That such was the Congressional intent has been amply demonstrated.

The United States will probably also contend that **only** the **taxpayer** can pay the State and offset the credit against the Federal tax. That contention ignores the Federal legislation itself which provides that State contributions may be made and the offset credit allowed when the assets are in the possession of a receiver, trustee or a court of competent jurisdiction.

Section 902(a) of Title IX of the Social Security Amendments of 1939 provided that in cases where the assets of an employer came into the custody of a receiver any time after August 10, 1939 and until October 9, 1939, the receiver could obtain the Federal credit for the years 1936, 1937 and 1938 by paying the State.

Section 1601(a)(3) of the Federal Unemployment Tax Act permits the full 90 per cent credit for the preceding year at any time if the assets of the employer come into the possesion of a receiver, trustee, or a court of competent

jurisdiction between the due date and the following June 30, and the State is paid.

Section 701(a) of the Revenue Act of 1940 provided that if the assets of the employer are in the control of a receiver appointed by or under the control of a court at any time between October 8, 1940 and December 6, 1940, 81 per cent of the credit for 1939 may be obtained by paying the State.

Section 701(b) of the Revenue Act of 1941 permitted a receiver appointed during the extension of time in which a solvent employer could pay the State and thereby obtain the Federal offset, to obtain an 81 per cent credit for the year 1940 by paying the State at any time.

A similar provision (Section 602(b), Revenue Code of 1943) permitted such credit for the years 1941 and 1942.

Thus, Congress has continuously indicated that it intended that the credit offset could be obtained by payment to the State, **even though insolvency had intervened and the payment is made under a receiver, trustee, or court of competent jurisdiction.** There is consistent with the Congressional concern with protection of the State funds from which benefits would be paid, even at the expense of the Federal tax.

As for the allowance of the offset frustrating the priority of the Federal government, it should be noted that Congress has specifically provided that such allowance be permitted in cases of insolvency and further, the Federal priority is *not* denied for the Federal claim is satisfied to the same extent by the payment and credit offset as it would be if the payment were made in cash.

In the instant case, the funds available for payment of unemployment taxes are insufficient to pay the Federal government its 10 per cent and and the State its full 90 per cent of the Federal claim. **Accordingly, there are three possible ways of handling the offset allowance.**

In *People* v. *Chicago Waste & Textile Co.*, 391 Ill. 29, 62 N. E. (2d) 537, the Illinois Supreme Court ordered that the funds remaining after payment of Title VIII taxes be first applied to pay the State's claim for unemployment contributions, which would be allowed as an offset credit to satisfy an equivalent part of the Federal claim.

To illustrate with an example, we may assume that the full three per cent owed to the Federal government was $10,000, that the amount owed to the State for unemployment contributions was $9,000, and that the available funds of the debtor amounted to only $5,000. If the entire $5,000 is paid to the United States first, its claim will have been satisfied to the extent of $5,000 and will remain unsatisfied to the extent of $5,000.

If, however, the $5,000 is paid to the State, the payment to the State will have the effect of reducing the claim of the United States by the amount of $5,000, due to the offset credit, and the unsatisfied part of the claim of the United States remains $5,000. Thus, the Federal claim is reduced and **satisfied equally** by payment directly to the Federal funds or to the State.

Thus, in the instant case, under the precedent set by the Illinois Supreme Court, all funds available for the payment of unemployment taxes would first be applied to the payment of the State's claim for unemployment contributions and the Federal claim correspondingly reduced.

The **second** possibility is the treatment accorded the offset credit by the Federal District Court in the case at bar (65 F. Supp. 763), where the court discusses and analyzes the decision of the United States Supreme Court in *People ex rel Gordon* v. *United States, supra.* The District Court ordered that 10 per cent of the Federal claim be paid first, and that the balance be paid to the State, with the offset

credit resulting therefrom reducing the Federal claim correspondingly. The Court said: (referring to *People ex rel Gordon* v. *United States*)

> "Mr. Justice Black had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States had not given the taxpayer the option to make payment to Illinois instead of to the United States. That, as I have said, is a problem less of priorities than of the discharge of alternative obligations and of marshalling assets. *In other words, Mr. Justice Black did not specifically consider whether a possible arrangement of claims ought not to be as follows: in a definitely preferred category the claim for capital stock taxes, the claim for Title VIII taxes, and the claim for 10 per cent of Title IX taxes;* and in what I can best describe as a suspended category the claim for 90 per cent of Title IX taxes and the claim for State unemployment compensation contributions,—the taxpayer *or his assignee or a court charges with administration of insolvent estates having the right to elect to pay the State and defeat 90 per cent of the United States Title IX claim;* * * *". (Emphasis ours.)

Using the same illustration as in the preceding possibility, where the Federal claim was $10,000, the State claim for contributions was $9,000, and the funds available for distribution amounted to $5,000,—under the treatment of the Massachusetts court, the Federal government would receive 10 per cent of its claim or $1,000 and the balance of available funds would be applied to the State claim, giving the State $4,000 or 45 per cent of its claim.

The inequities of this method are apparent in that it allocates a disproportionately large share of available funds for the costs of administration at the expense of the State funds which are devoted to the payment of benefits, the actual purpose of the legislative program. This is contrary to the intention of Congress which regarded 90 per cent as the proper share to safeguard the funds for the payment of benefits.

Thus, although under the Illinois Supreme Court decision, the State would be entitled to have available funds first applied to its claim, we believe the most equitable arrangement is the **third** possible method of handling the offset: **Under this method the available funds would be allocated as follows: 10 per cent of the available funds to the Federal government, and 90 per cent to the State government,** the latter amount being offset against the Federal claim. This procedure is in keeping with the underlying purposes of the legislation. It gives consideration to the Federal government for the amount which is to be used for the administrative purposes, and to the State government in the maintenance of funds for the payment of unemployment benefits, and **the allocation is made in the proportion which Congress considered would give protection to both the costs of administration and the State funds from which benefits are to be paid.**

Using the same illustration with the government claim for $10,000, the State claim for $9,000, and the available funds of $5,000, the allocation of available funds would be as follows: 10 per cent of the available funds or $500 to the Federal government, and 90 per cent of the available funds or $4500 to the State government.

It is to be noted that this last arrangement would **not** be in derogation of the Federal priority, since any amount which is paid to the State may be offset against the Federal claim and the Federal claim is correspondingly satisfied. Thus, in the above example, by means of the offset credit the Federal claim is reduced and satisfied to the extent of $5,000, which is exactly the same amount that it would be reduced and satisfied if the full amount of cash were paid directly to the Federal government.

Such action does not "frustrate the government's priority under Section 3466." It is clear that Congress

intended and actually preferred that up to 90 per cent of its claim for unemployment taxes be satisfied in this manner by payment to the State, and such payment is "satisfaction" of the Federal claim within the terms of Section 3466.

In view of these considerations, we most respectfully submit that the petition of the Commonwealth of Massachusetts for the writ of *certiorari* in the instant case should be allowed on the additional ground (Rule 38 (5) (b)) that the Circuit Court of Appeals has, in the instant case, decided a Federal question of substance in a way probably in conflict with the applicable decisions of this Court and with the intent of Congress as manifested in the Social Security Act and related legislation.

CONCLUSION.

For the reasons above stated, the State of Illinois, as *amicus curiae*, most respectfully prays that the petition of the Commonwealth of Massachusetts for a writ of *certiorari* be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 157

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE.

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vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States:

This brief by the State of Illinois, as *amicus curiae*, is filed under the provisions of Rule 27 (9) of this Court. As will hereinafter more fully appear, the State of Illinois, by virtue of certain litigation in which it has already been and is now involved, is directly interested in having this Honorable Court reverse the judgment of the Circuit Court of Appeals in this case.

THE OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts, entered on May 1, A. D. 1946, is officially reported at 65 Fed. Supp. 763.

The opinion of the Circuit Court of Appeals for the First Circuit, entered on April 2, A. D. 1947, is officially reported at 160 Fed. (2d) 614.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code (28 U. S. C. A. 347) as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered on April 2, 1947, the petition for a writ of *certiorari* was filed in this Court on June 27, 1947 and was allowed on October 13, 1947.

CONCISE STATEMENT OF THE CASE.

The Federal question of substance, which is presented by the instant case, may be precisely stated as follows:

Where a taxpayer, owing Federal capital stock, Title VIII (Old Age Insurance) and Title IX (Federal Unemployment) taxes and State unemployment taxes, becomes insolvent and makes an assignment for the benefit of his creditors, and his assignee pays in full all capital stock and Title VIII taxes with interest—

> May the Federal government's right to priority of payment, insofar as Title IX taxes are concerned, be "satisfied" within the meaning of R. S. 3466, by the payment of only 10% of the face amount of said tax (or 10% of the funds available) directly to the Federal

government and the payment of the balance to an approved State unemployment fund (as the taxpayer could himself have done had he remained solvent), as the District Court, in effect held?

Or

Does R. S. 3466 require that the State's normal 90% share in the face amount of said Title IX taxes (which is used by the States only to pay actual benefits to unemployed workers) be forfeited in its entirety to the Federal government (which pays no unemployment benefits and, but for the taxpayer's intervening insolvency, would have been entitled only to 10% of the face amount of such taxes to defray its administrative costs), as the Circuit Court of Appeals, in effect held?

This question arises from **facts** which are **not** in dispute and may concisely be stated as follows:

The Somerville Sales & Service, Inc., being insolvent, in 1939 made a common law assignment for the benefit of its creditors. The Commissioner of Internal Revenue filed with the assignee a claim against the assignor for 1938 Federal unemployment taxes under Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 Federal insurance contribution taxes under Title VIII of the said Act in the sum of $690.05 and for 1939 Federal capital stock taxes in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for State unemployment taxes under the Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions due it for the years 1938 and 1939. On October 6, 1939, the assignee paid, out of the sum of $1,135.11 which he had realized from the sale of the debtor's assets, the sum of $803.72 in full payment of the claim of the Commonwealth of Massachusetts and the remainder of $331.39 he paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII due for 1938 and there remained unpaid the sum of $1,-

342.74 with interest. Massachusetts has agreed to pay over the above-mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under R. S. 3466, and the United States has agreed that it prevails the judgment shall be limited to $803.72.

On these facts, the District Court, on May 1, 1946, held that the United States had priority for the full amount of its capital stock and Title VIII taxes and for 10% of the amount of its Title IX taxes, but that it could not recover the remaining 90% of said tax on the ground that the taxpayer or his assignee had the alternate right to pay 90% of his obligation under Title IX to an approved State unemployment fund (65 Fed. Supp. 763).

On appeal and cross-appeal, the Circuit Court of Appeals for the First Circuit, on April 2, 1947, affirmed the judgment of the District Court as to capital stock and Title VIII taxes but reversed as to Title IX taxes, holding, in substance, that the taxpayer's assignee had no alternative right to pay any part of the Title IX taxes to a State unemployment fund and that the United States had priority, under R. S. 3466, for the **full** amount of capital stock taxes, Title VIII taxes **and** Title IX taxes (160 Fed. (2d) 614).

The present action by the Commonwealth of Massachusetts seeks to reverse the decision last above described.

ARGUMENT.

I.

The Two Gordon Cases, Upon Which the Circuit Court of Appeals and the Federal Government Rely, Did Not Involve Title IX (Federal Unemployment) Taxes and Are Not Controlling Here.

On May 23, 1945, the Supreme Court of Illinois, in the consolidated cases of *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *Advertising Review Publishing Company, et al.—(United States of America, Appellant),* No. 28490, and *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *The Chicago Waste & Textile Company, et al.—(Carter H. Harrison, Collector of Internal Revenue, Appellant),* No. 28474, reported at 391 Ill. 29, held, in substance, that under Section 3466 of the Revised Statutes, the United States was entitled to priority on that portion of its claim which was for Federal insurance contributions (under Title VIII of the Social Security Act) plus interest, and that any balance thereafter remaining should be paid to the Director of Labor of the State of Illinois and credited against the claim of the United States for Federal unemployment taxes (under Title IX).

In 1946, upon petitions by the State of Illinois, this Court granted writs of *certiorari* to review said decisions, the *Advertising Review* case (No. 28490) becoming, in this court, *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner,* v. *United States of America, Respondent,* No. 749 of 1945; and the *Chicago Waste & Textile* case becoming *People of the State of Illi-*

nois, ex rel. Robert L. Gordon, Director of Labor, Petitioner, v. *Nigel D. Campbell, Collector of Internal Revenue, Respondent*, No. 750 of 1945 and later No. 35 of 1946.

In said No. 749 (*Gordon* v. *United States*), this State, in brief, contended:

1—That, because of the intent of Congress as manifested in the Social Security Act and related legislation, Section 3466 of the Revised Statutes did not apply to give the United States priority for Social Security and capital stock taxes over the claims of a State for unemployment compensation contributions.

2—That the claim of the State for unemployment compensation contributions was a secured claim and was therefore entitled to priority over the unsecured claims of the United States for Social Security and capital stock taxes.

On April 22, 1946, this Court, in said No. 749 (*Gordon* v. *United States*, 328 U. S. 8), *held* that the provisions of the Social Security Act and related Federal legislation did *not* evince an intent on the part of congress to amend R. S. 3466 by making its provisions inapplicable as against state unemployment compensation contributions, and *affirmed* the ruling of the Illinois Supreme Court. *Actually* no issue as to Federal unemployment (Title IX) taxes was involved.

In said No. 750 (*Gordon* v. *Campbell*) (later No. 35 of 1946), this State, in brief, contended:

1—Same at No. 1 in No. 749 (above).

2—That the debtor was not insolvent within the meaning of Section 3466 of the Revised Statutes.

3—That the State's lien for unemployment compensation contributions was so specific and so far perfected as effectually to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal government's access to such funds.

4—Same as No. 2 in No. 749 (above).

On December 23, 1946, this Court in said No. 750 (*Gordon v. Campbell*, 329 U. S. 362), which had by then become No. 35 of the October 1946 term, after pointing out that the earlier decision in No. 749 controlled the same issues in the latter case, *further held* that the debtor was insolvent within the meaning of Section 3466 and that the lien of the State of Illinois was not sufficiently specific or perfected to defeat the Federal government's priority under Section 3466, and *affirmed* the ruling of the Illinois Supreme Court. Again, the issue did *not* involve Federal unemployment (Title IX) taxes.

The decisions of this Court in these two *Gordon* cases are the decisions upon which the Circuit Court of Appeals for the First Circuit relies most heavily in the decision which the Commonwealth of Massachusetts here seeks to reverse.

Apparently because of the relatively small amounts involved, the Federal government failed to file its own cross-petitions for *certiorari* in these two *Gordon* cases, thereby *precluding* this Court from reaching or passing upon the *further* question whether the Supreme Court of Illinois had erred in holding that, after the Federal government had been paid its Federal insurance contributions (under Title VIII), the balance then remaining should be paid to the State Director of Labor and credited against the claim of the United States for Federal unemployment taxes (under Title IX), substantially as Massachusetts now contends in the case now at bar.

Thus, in these two *Gordon* cases, this Court did *not* pass upon or settle the question now presented by the instant case. So far as we are advised, this Court has not, until the filing of the instant case, had an opportunity to pass upon or settle the precise but nevertheless extremely important Federal question of substance here presented.

That the Federal question here presented to this Court for the first time is not purely academic or abstract is evidenced, at least in part, by the fact that the State of Illinois has, at the present time, pending and undetermined in the Federal District Court for the Northern District of Illinois, Eastern Division, at Chicago, two cases entitled *United States of America, plaintiff*, v. *P. C. Gartley Motors Company, et alia, defendants*, No. 44-C-671; and *Robert G. Mitchell, assignee, etc., plaintiff*, v. *Carter H. Harrison, Collector, et al., defendants*, No. 44-C-716, which involve this same precise issue and have been continued generally pending the ruling of this Court upon the petition for a writ of *certiorari* in this instant case.

In view of these considerations, we most respectfully submit that the two *Gordon* cases, upon which the Circuit Court of Appeals and the Federal government rely, did *not* involve Title IX (Federal Unemployment) taxes and are *not* controlling here.

II.

Insofar as Title IX (Federal Unemployment) Taxes Are Concerned, the Federal Government's Priority Extends Only to 10% of the Face Amount of Its Claim (or 10% of the Funds Available) Because 90% of Its Claim Has Already Been "Satisfied" Within the Meaning of R. S. 3466 by the Assignee's Payment to an Approved State Unemployment Fund.

Any discussion of this subject must take cognizance of the history and operation of this social legislation which clearly indicates the close integration and inter-relationships between the Federal and State measures to combat the evils of unemployment.

The critical conditions which give rise to a national program of unemployment insurance have been graphically described by this Court in *Steward Machine Company* v. *Davis*, 301 U. S. 548, which involved the constitutionality of Title IX, where this Court, at pages 586-588, declared:

> "* * * there is need to remind ourselves of facts as to the problem of unemployment * * *. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than ten million; at times a peak was attained of sixteen million or more. Disaster to the breadwinner meant disaster to dependents. * * * The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66. *Helvering* v. *Davis*, decided herewith, *post*, p. 619. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states * * * incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. * * * Insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the government of the nation."

In *Helvering* v. *Davis*, 301 U. S. 619, which involved an attack upon the constitutionality of Titles II and VIII of the Social Security Act (Old Age Benefits), this Court, at page 541, stated:

> "* * * The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. * * * Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest. * * *"

The national scope of the problem of unemployment was stressed by the President of the United States in his message to Congress on June 8, 1934,[1] wherein he declared:

> "We are compelled to employ the active interests of the nation as a whole through government in order to encourage a greater security for each individual who composes it. * * * If, as our Constitution tells us, the Federal government was established, among other things, 'to promote the general welfare' it is our plain duty to provide for that security upon which welfare depends. * * *"

Both branches of Congress emphasized that unemployment relief posed the most serious question for the nation.[2]

It was a problem nation-wide in scope which could not be combatted by the States acting individually. Moreover, most States were reluctant to enact unemployment compensation legislation for fear of imposing the additional burden of taxation entailed upon their already depressed

[1] Cong. Rec., Vol. 78, Pt. 10, p. 10770.

[2] Senate Report No. 628, 74th Congress, 1st Session, p. 10; House Report No. 615, 74th Congress, 1st Session, p. 7.

industries, thus placing their industries at a disadvantage in competing with industries of States which had no such legislation.

To cope with the problem of unemployment, Congress enacted Title III, VII and IX of the Social Security Act.[3] Briefly, Title IX levied a uniform pay roll tax on employers of eight or more throughout the nation. **The Federal Statute**, however is not of itself a complete unemployment compensation law; it provides pay roll taxes but **makes no provision for the payment of unemployment compensation to unemployed workers, leaving that function to the States.**

It is obvious that a mere plan for taxation would not solve the problem which faced Congress and the nation. The heart of any plan to remedy the evil of unemployment is the stabilization of employment and **the payments of benefits to unemployed workers to cushion and thereby prevent the cumulative effects of loss of income.** This vital function, under the Federal plan, was to be carried on **by the States** in the systems which the Federal Act sought to stimulate.

The Federal plan was simply this: As most States were hesitant to set up unemployment compensation systems because of the disadvantage it would impose upon their industries in interstate competition, the Federal plan levied a tax on employers of **all** States, and then proceeded to allow an offset credit up to 90 per cent of the Federal tax to those employers who contributed to State unemployment compensation funds. The combination of the nation-wide tax and the offset credit for amounts paid into State funds thereby equalized the burden on all industries. Since employers of all States were obliged to pay the Federal pay roll tax, and yet the Federal Government paid no benefits

[3] Chap. 531, 49 Stat. 620.

to workers, the plan of the Federal legislation both removed the fear of disadvantage in interstate competition and offered an inducement to the States to set up approved unemployment compensation systems whereby the State employers could obtain the offset credit and the State workers could obtain benefits in the event of unemployment.

Further to encourage the States to establish unemployment compensation systems, Congress, in Title III of the Social Security Act, provided for grants to cover the administrative costs of such systems. The funds for such grants are appropriated by Congress from the 10 per cent of the Federal tax which the government retains for the purpose of meeting the costs of administering the State unemployment compensation systems. However, as in Title IX, the State unemployment compensation laws are required to meet certain minimum criteria.

As stated by the President in his message to Congress on January 17, 1935,[4] sponsoring the Federal law:

> "With respect to Unemployment Compensation, I have concluded that the most practical proposal is the levying of a uniform Federal pay roll tax, 90 per cent of which should be allowed as an offset to employers contributing under a State Unemployment Compensation Act. The purpose of this is to afford a requirement of a reasonable uniform character for all states cooperating with the Federal Government, and *to promote and encourage the passage of unemployment compensation laws in the states.* The ten per cent offset should be used to cover the cost of Federal and State administration of this broad system." (Emphasis added.)

The 90 per cent credit provision in the Federal law was designed to encourage the passage of State unemployment

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[4] Cong. Rec., Vol. 79, Pt. 1, p. 546.

compensation laws which would provide the actual protection against unemployment by the payment of benefits. It provides that each employer may reduce his Federal tax up to 90 per cent by the amount he has contributed to a State unemployment compensation fund.

The Federal tax being 3 per cent of the pay roll, practically all States enacted legislation calling for a standard tax of 2.7 per cent of the pay roll of employers subject to the scope of their legislation, the 2.7 per cent rate being equivalent of 90 per cent of the Federal tax. Thus an employer paying the full State tax and offsetting this amount against his Federal tax paid no more than if he had paid the full Federal tax to the Federal government, yet the amount he paid to the State went into the funds which actually operated as the protective device against the menace of unemployment.

Under normal conditions where the employer is solvent, the credit provisions operate as follows:

If an Illinois employer had a taxable pay roll in the amount of $100,000 in the year 1938, it would have had a Federal tax (without deducting the offset credit) of $3,000. Contributions to the State of Illinois at the rate of 2.7 per cent would amount to $2,700. If the employer paid the State, he would be able to credit the State payments against the Federal tax to the extent of 90 per cent of the latter. Since the amount of $2,700 is exactly 90 per cent of $3,000, the amount of the Federal tax, the employer would be entitled to offset the full amount of the payment to the State against the Federal tax and the amount actually due the Federal government would have been $300, rather than $3,000.

The plain purpose of the credit is to build up an adequate fund through the payment of contributions into the

State unemployment compensation systems through which the fundamental purpose of the entire legislation would be effected. Clearly, Congress was not concerned with Federal revenue in this measure, for the credit provision clearly indicates that 90 per cent of the tax was never intended to flow into the Federal revenue. That 90 per cent was a lever to pressure the States into enacting unemployment compensation systems necessary to fulfill the end sought by the Social Security Legislation. It must be borne in mind that the Federal government paid no benefits and the success of the plan to combat unemployment depended on the State systems which insured the worker against loss of income in the event of unemployment.

That these principles were uppermost in the mind of Congress in extending the credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.[5] Moreover, Congress believed that the general welfare of the country would be better served by the payment of contributions into State unemployment compensation funds than by the payment of the tax to the Federal government. *Steward Machine Company* v. *Davis, supra,* p. 589.

Under Title IX, the 90 per cent credit may be taken when the State has been paid on or before the last day on which the employer is required to file its yearly Federal return, i.e., February 1 of the following year. However, if the payment was made to the State after February 1, but on or before the following June 30, a credit of 81 per cent was permitted against the Federal tax. This reduction in the amount of credit allowed after February 1 provided an inducement to employers to make prompt payment to the States.

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[5] Senate Report No. 628, 74th Congress, 1st Session, p. 15; House Report No. 615, 74th Congress, 1st Session, p. 16.

Further evidence in Title IX that Congress was primarily interested in building up the State funds lies in the removal of the time linfitation for the obtaining of the full 90 per cent credit in those cases where the assets of the employer are in the hands of a court of competent jurisdiction at any time between the due date and the following June 30.

Nor is it only in Title IX that Congress has evidenced its intent to build up State funds, for time and time again Congress has demonstrated that it is the payment of contributions to the States which advances the purposes of the Federal government. Although the credit against the Federal tax was originally allowed only if contributions to State funds were paid within a specified period of time, Congress has repeatedly amended Title IX so as to extend the credit to taxpayers who are delinquent in the payment of contributions, in order to induce them to pay their contributions to the States.[6]

In the second Revenue Act of 1940, Congress waived the time for obtaining credit against the Federal tax in the case of any taxpayer who was delinquent in his 1936, 1937, 1938, or 1939 contributions to a State fund. Such taxpayers were allowed the full 90 per cent credit if they paid their 1936, 1937, or 1938 contributions to their own State before December 6, 1940. As to the 1939 contributions, the credit was limited to 81 per cent of the Federal tax, except that the full 90 per cent credit could be taken regardless of the date when paid to a State fund, in those cases where the assets of the taxpayer were in the control of a receiver appointed by or under the control of a court in the period subsequent to the passage of the Act and December 6, 1940.

[6] Section 1601, Internal Revenue Act of 1939; Section 701, Second Revenue Act of 1940; Section 701, Revenue Act of 1941; Section 602, Revenue Act of 1943.

In the same Act, another special exception is made where contributions have been paid by mistake to the wrong State. In such case, payment under the proper State law is considered to have been made on the date of the erroneous payment, for the purposes of credit against the Federal tax.

The Revenue Act of 1941 continued the policy of encouraging the payment of delinquent contributions to the State by allowing full credit against the Federal tax for the payment of State taxes for 1936, 1937, and 1938, and by allowing a credit of 81 per cent for the payment of 1939 and 1940 State unemployment compensation contributions.

Finally, in the Revenue Act of 1943 (Section 602, Public Law 235, enacted February 25, 1944) Congress extended the 81 per cent credit offset for the payment of delinquent taxes for any year, **regardless of the date of payment of State contributions.**

It is to be stressed that in the absence of these foregoing enactments waiving the time limitations, the Federal government would have been entitled to the full three per cent, **regardless of whether or not the State was paid**. Yet the Federal government has repeatedly foregone the collection of taxes **technically due to it** in order to induce payment of contributions into State funds. It is apparent that Congress intended the Federal government should receive only 3/10 of one per cent and that the additional amount which it continually waived in favor of the payment into State funds was the device whereby taxpayers would be induced to pay their State contributions.

Thus by the numerous exceptions extending the time for credit, Congress has clearly indicated that its prime concern is in the building up of State funds for the payment

of unemployment benefits. **Any doubt that Congress did not consider this as a source of revenue for the Federal government is resolved by the 1937 Act of Congress[7] wherein Congress authorized an appropriation in excess of $20,000,000.00 to this State's unemployment compensation fund. This represented 90 per cent of the taxes which the Federal government had collected from Illinois employers prior to the enactment of the Illinois Unemployment Compensation Act.**

The intention of Congress to achieve the purposes for which Title IX was enacted, through the payment of contributions into State unemployment compensation systems, is strikingly revealed in this action, which was part of legislation which turned back 90 per cent of the taxes collected from employers prior to the enactment of State systems into the State unemployment compensation systems which had been established subsequent to the initial payments of taxes under Title IX. Nothing could demonstrate more clearly the Congressional intent that the State should receive 90 per cent of the amount due the Federal government under Title IX.

Further illustration of the interest of Congress in this measure as part of a plan to stabilize employment and not as a revenue source is disclosed in its willingness to allow the taxpayer to offset against the Federal tax the credit which he has received against State contributions under a State plan of experience rating. Ordinarily, where the Federal tax is 3 per cent of the pay roll and the State tax is 2.7 per cent, contributions paid into the State fund equal 90 per cent of the Federal tax and the entire credit is obtained.

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[7] Public Act 353, Ch. 755, 50 Stat. 754; Second Deficiency Appropriation Act of 1938, Ch. 681, 52 Stat. 1148.

However, under the "experience rating" provisions of the Illinois Unemployment Compensation Act and of the Acts of other States, employers may pay contributions at a lower rate; in Illinois as low as 5/10 of one per cent. Thus, employers who have a stable employment record are required to pay contributions which amount to considerably less than 90 per cent of the Federal tax. This experience rating plan by the reward of a lower rate is intended to induce employers to stabilize their employment, and so, if the employer were allowed to credit against the Federal tax only what he **actually** paid into the State fund, his total tax would remain the same and the inducement would fail of its purpose. Consequently, to avoid disappointing this incentive, the Federal law[8] permits the taxpayer, in addition to the credit for the amount actually paid to the State funds, to take a further credit equal to the difference between the amount of State contributions which he would have had to pay, had he not secured the reduced rate, and the amount that he actually paid to the State. In other words; the additional credit equals the amount of the reduction in the State tax.

This provision illustrates quite clearly the obvious intention of Congress that the United States was to receive only .3 of one per cent and that Congress was willing to offset against the Federal tax not only the actual amounts paid into State funds but also the credits allowed by the States under approved experience rating plans.

There is still further proof, if need be, of the deep concern which Congress has manifested in the maintenance and growth of State unemployment compensation funds. Congress has fully recognized that such funds would play a major role during the period of post-war readjustment

[8] Title IX, Social Security Act, 1937; Section 1602, Internal Revenue Code, 1939.

and would serve as the first line of defense for the millions of workers employed in war industries who would be laid off and unemployed during industry's reconversion and readjustment to peace-time production. The Senate and the House appointed Special Committees on Post-War Economic Policy and Planning, which held extensive hearings on the problem of unemployment compensation in the post-war period.[9] Interviews with representatives of important government and private agencies on post-war problems and plans disclosed that "The fear of unemployment after the war colors the thinking of all the agencies interviewed. Those concerned with the labor problems give it first rank in their planning."[10] As a result of the recommendations of the said Special Committees on Post-War Economic Policy and Planning,[11] Congress enacted legislation guaranteeing the solvency of State unemployment compensation funds. The War Mobilization and Reconversion Act (Title XII)[12] authorizes loans to the several States for the purpose of bolstering State unemployment funds.

From the foregoing it is evident that Congress never contemplated that the full three per cent would be paid to the Federal government, as the United States will perhaps contend. The primary concern of the Federal legislation was not in revenue to build up the Federal treasury, but on the contrary to force the accumulation of State funds for the payment of benefits. It is apparent that Title IX

[9] Hearings before the Special Committee on Post-War Economic Policy and Planning, United States Senate, 78th Congress, Second Session, Pt. 3, Unemployment Compensation; Hearings before the Special Committee on Post-War Economic Policy and Planning, House of Representatives, 78th Congress, 2nd Session, Pts. 2 and 3, Economic Problems of the Transition Period.

[10] Senate Document No. 106, 78th Congress, 1st Session, p. 79.

[11] Senate Report No. 539, Pt. 5, 78th Congress, 2nd Session, p. 6; House Report No. 1855, 78th Congress, 2nd Session, pp. 27-28.

[12] 50 U. S. C. A. App. 1667; Senate Report No. 565, 79th Congress, 1st Session, p. 2.

was intended to collect a Federal tax sufficient only to enable the United States, through the Social Security Board, to provide for the administration of State unemployment compensation systems. Any accrual to the general revenue has been incidental and was not contemplated. The tax collected has been more than ample to meet the need.[13]

To refuse to recognize that payment to the State would be applicable against the Federal tax under the offset provisions of the Federal legislation would deprive the State of funds needed to pay benefits, thereby defeating the patent intent of Congress. **It must be emphasized that the employees of a delinquent insolvent employer must be paid benefits under Illinois law if they are otherwise eligible, regardless of whether or not the State collects the corresponding contributions from the employer.** Congress, by the numerous exceptions and extensions, has evidenced that it considers payment into the State funds as more important to the fundamental purpose of social security than payment into the Federal treasury.

Section 3466 of the Revenue Code does not enter into this consideration for there is no question of priorities in the State's contention. It is simply a question of the intention of Congress—whether Congress intended that the Federal tax could be satisfied by payment into a State fund. The question must be answered in the affirmative.

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[13] On June 7, 1944, in hearings before the subcommittee of the Committee on Appropriations, United States Senate, 78th Congress, second session on H. R. 4899, Chairman of the Social Security Board Altmeyer, at Page 39 of the hearings report, stated:

> "That is another phase, I think that should be borne in mind. The Federal Government gets three-tenths of one per cent of the three per cent unemployment compensation tax which is levied by the Federal Government. That three-tenths of one per cent has been $450,000,000 in excess of the annual appropriations that Congress has made to the various States for the administration of The Unemployment Compensation Act. So at the present time the Federal Government is $450,000,000 ahead."

The same conclusion was reached by the United States District Court in the case here at bar, where the Court stated (65 F. Supp. 763):

"The question, nicely analyzed, seemed to me to be one not of priority but of alternative obligation.

"The force of that analysis seemed to me to be more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548 was stressed. *As to 90 per cent of the taxes under that Title the objective of Congress was not to collect Federal revenues but to stimulate the creation of and payment to State unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under State unemployment compensation plans.*

"The correctness of the foregoing reasoning seemed to me to be proved by a supposititious case. Suppose A, an insolvent, with $200 in assets, owed $100 to the United States for 1938 Title IX taxes, 90 to Massachusetts for 1938 unemployment compensation contributions and $200 to general creditors. Can it be supposed that a court that was sensitive to the principle of marshalling assets would distribute the assets so that the United States received the first $100, Massachusetts the second $90, and the general creditors $10? To do that would give the two governments more than Congress contemplated and restrict the general creditors to 5 cents on the dollar. Would not a court that was mindful of the strict legal rights of the two governments, of the policies declared in their legislation and of the rights of the general creditors to be subject to no greater priorities than those governmental rights and policies require, distribute $10 to the United States, $90 to Massachusetts, and $100 or 50 cents on the dollar to the general creditors? *This would allow the two governments to receive all that they claimed from the insolvent before his insolvency and would follow the rules of priority established by R.S. § 3466.*" (Emphasis added.)

Even if one does consider Section 3466 in connection with the matter, the State's contention is not inconsistent with the priorities established by that provision. Section 3466 requires that debts due the United States "be first satisfied." The statute does not say and does not mean that a debt in all cases must be fully paid in cash. For example, the debt may be compromised,[14] and property may be received in payment.[15] The word "satisfied" clearly expresses this thought. An accord and "satisfaction" has long been a recognized means of discharging a debt.

Any construction that the Federal government must be paid the full three per cent in cash first, would lead to absurd situations. Assume for the purpose of illustration that the debtor owed the sum of $10,000.00 to the United States for Federal Unemployment Tax, and that he owed the State $9,000.00 for unemployment contributions. Assume further that there is available for distribution the amount of $10,500.00. Yet, if as may be argued by the government, the full amount must first be paid to the Federal government in cash, with no allowance for the offset credit, an absurd situation results. In such case the Federal government would receive the full $10,000.00 and $500.00 would remain for the State. However, the debtor could then obtain a refund from the Federal government because of the $500.00 payment to the State on the basis of the offset credit. The $500.00 refunded by the Federal government then would be applied to the balance owing to the State and thus in turn qualify the debtor's estate for a refund from the Federal government for this second $500.00 paid to the State. This process could be repeated until the State had been paid the full amount of $9,000.00 and the Federal

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14 Revised Statutes, Section 3469, 31 U. S. C. A. 194; Internal Revenue Code Section 3761.

15 Op. Atty. Gen. 236.

government retained the amount of $1,000.00, **which was all that Congress intended the Federal government should get where a State system had been set up.** And certainly Congress never intended that such circuitous process would have to be resorted to in order for the State to obtain the contributions Congress intended it to have.

Thus, in the foregoing case, if the debtor had remained solvent, the State would have received $9,000.00 and the United States $1,000. The same result would follow even though the debtor became insolvent, but the assets were $10,001 or more. This ultimate result would certainly be in accord with the expressed intention of Congress. But if the assets amounted to $10,000 exactly or less, the interpretation that the Federal government must be paid its three per cent in cash without allowance for the offset credit would give the Federal government a windfall of $9,000, at the expense of the State unemployment compensation funds. Such a result would certainly distort the end sought to be accomplished by this legislation. The additional 90 per cent, never contemplated by Congress as revenue but intended more or less as a penalty to prod the States to create unemployment compensation systems, would be converted into a penalty on the State which had so created a system at the prompting of Congress. For, as pointed out, the State has assumed the obligation of paying benefits to the former employees of the employer regardless of whether or not it has collected the corresponding contributions from the employer.

The United States government, in support of its contention that it should receive the full 3 per cent Federal Unemployment Tax, will no doubt rely upon this Court's decisions in *People ex rel Gordon* v. *Campbell*, 329 U. S. 362, and *People ex rel Gordon* v. *United States*, 328 U. S. 8.

Those cases are not controlling on this issue, for, as we have already pointed out (ante, pp. 5-8), the statements concerning priorities with regard to Title IX taxes are *dicta*. The facts and issues in these two *Gordon* cases were such that it was merely a question as to the relative status of State contributions and taxes under Title VIII.

But it will no doubt be asserted that the legislation under Title VIII and Title IX are so closely related that the reasoning of the Supreme Court is decisive on issues arising under Title IX as well as Title VIII.

It is true that both Titles are designed to promote the economic security of the worker. Title VIII is directed against insecurity caused by loss of income resulting from the incapacities of old age. Loss of income due to the recurrent periods of individual unemployment and to mass cyclical unemployment is sought to be corrected in Title IX.

But however related the purposes for which Titles VIII and IX were enacted, the means used to achieve that result are different. **Under Title VIII, the Federal government has undertaken the payment of old age benefits. Under Title IX, the Federal government does not pay benefits to unemployed workers; that is undertaken by the States** and the offset credit of 90 per cent of the Federal tax is considered as the means of inducing the establishment of State systems. **There is no offset allowance against taxes for Federal Old Age and Survivors' Insurance under Title VIII**; for these funds are needed for the financing of the benefit payments under Title VIII. There is the allowance of the offset credit under Title IX because the Federal government pays no unemployment benefits and those funds paid into the State systems are accomplishing the Federal purpose. Thus, this Court could say, as it did in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, that the needs

of the Federal treasury could be cared for as well by the payment of unemployment compensation contributions to the States as by payment of taxes to the United States.

Thus, although both Title VIII and Title IX have the same end in view, economic security for workers, **the means used to achieve that purpose are divergent.** In the one, the whole tax was intended to be collected as revenue for the financing of benefits to be paid by the Federal government. In the other, only 10 per cent was intended to come into the Federal treasury, and the rest was to be channelled into State unemployment compensation funds, there to be used in the payment of benefits.

Nor, as has been pointed out, is there a question of priorities. The question is solely whether Congress intended that the Federal claim for unemployment taxes could be "satisfied" by the offset credit for funds paid into State unemployment compensation funds. That such was the Congressional intent has been amply demonstrated.

The United States will probably also contend that **only** the **taxpayer** can pay the State and offset the credit against the Federal tax. That contention ignores the Federal legislation itself which provides that State contributions may be made and the offset credit allowed when the assets are in the possession of a receiver, trustee or a court of competent jurisdiction.

Section 902(a) of Title IX of the Social Security Amendments of 1939 provided that in cases where the assets of an employer came into the custody of a receiver any time after August 10, 1939 and until October 9, 1939, the receiver could obtain the Federal credit for the years 1936, 1937 and 1938 by paying the State.

Section 1601(a)(3) of the Federal Unemployment Tax Act permits the full 90 per cent credit for the preceding

year at any time if the assets of the employer come into the possession of a receiver, trustee, or a court of competent jurisdiction between the due date and the following June 30, and the State is paid.

Section 701(a) of the Revenue Act of 1940 provided that if the assets of the employer are in the control of a receiver appointed by or under the control of a court at any time between October 8, 1940 and December 6, 1940, 81 per cent of the credit for 1939 may be obtained by paying the State.

Section 701(b) of the Revenue Act of 1941 permitted a receiver appointed during the extension of time in which a solvent employer could pay the State and thereby obtain the Federal offset, to obtain an 81 per cent credit for the year 1940 by paying the State at any time.

A similar provision (Section 602(b), Revenue Code of 1943) permitted such credit for the years 1941 and 1942.

Thus, Congress has continuously indicated that it intended that the credit offset could be obtained by payment to the State, **even though insolvency had intervened and the payment is made under a receiver, trustee, or court of competent jurisdiction.** This is consistent with the Congressional concern with protection of the State funds from which benefits would be paid, even at the expense of the Federal tax.

As for the allowance of the offset frustrating the priority of the Federal government, it should be noted that Congress has specifically provided that such allowance be permitted in cases of insolvency and further, the Federal priority is *not* denied for the Federal claim is satisfied to the same extent by the payment and credit offset as it would be if the payment were made in cash.

In the instant case, the funds available for payment of unemployment taxes are insufficient to pay the Federal gov-

ernment its 10 per cent and the State its full 90 per cent of the Federal claim. **Accordingly, there are three possible ways of handling the offset allowance.**

In *People* v. *Chicago Waste & Textile Co.*, 391 Ill. 29, 62 N. E. (2d) 537, the Illinois Supreme Court ordered that the funds remaining after payment of Title VIII taxes be first applied to pay the State's claim for unemployment contributions, which would be allowed as an offset credit to satisfy an equivalent part of the Federal claim.

To illustrate with an example, we may assume that the full three per cent owed to the Federal government was $10,000, that the amount owed to the State for unemployment contributions was $9,000, and that the available funds of the debtor amounted to only $5,000. If the entire $5,000 is paid to the United States first, its claim will have been satisfied to the extent of $5,000 and will remain unsatisfied to the extent of $5,000.

If, however, the $5,000 is paid to the State, the payment to the State will have the effect of reducing the claim of the United States by the amount of $5,000, due to the offset credit, and the unsatisfied part of the claim of the United States remains $5,000. Thus, the Federal claim is reduced and **satisfied equally** by payment directly to the Federal funds or to the State.

Thus, under the **first** possibility, under the precedent set by the Illinois Supreme Court, all funds available, for the payment of unemployment taxes would first be applied to the payment of the State's claim for unemployment contributions and the Federal claim correspondingly reduced.

The **second** possibility is the treatment accorded the offset credit by the Federal District Court in the case at bar (65 F. Supp. 763), where the court discusses and analyzes the decision of the United States Supreme Court in *People*

ex rel Gordon v. *United States, supra.* The District Court ordered that 10 per cent of the Federal claim be paid first, and that the balance be paid to the State, with the offset credit resulting therefrom reducing the Federal claim correspondingly. The Court said: (referring to *People ex rel Gordon* v. *United States*)

> "Mr. Justice Black had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States had not given the taxpayer the option to make payment to Illinois instead of to the United States. That, as I have said, is a problem less of priorities than of the discharge of alternative obligations and of marshalling assets. *In other words, Mr. Justice Black did not specifically consider whether a possible arrangement of claims ought not to be as follows: in a definitely preferred category the claim for capital stock taxes, the claim for Title VIII taxes, and the claim for 10 per cent of Title IX taxes;* and in what I can best describe as a suspended category the claim for 90 per cent of Title IX taxes and the claim for State unemployment compensation contributions,—the taxpayer *or his assignee or a court charges with administration of insolvent estates having the right to elect to pay the State and defeat 90 per cent of the United States Title IX claim;* * * *" (Emphasis ours.)

Using the same illustration as in the preceding possibility, where the Federal claim was $10,000, the State claim for contributions was $9,000, and the funds available for distribution amounted to $5,000,—under the treatment of the Massachusetts court, the Federal government would receive 10 per cent of its claim or $1,000 and the balance of available funds would be applied to the State claim, giving the State $4,000 or 45 per cent of its claim.

The inequities of this method are apparent in that it allocates a disproportionately large share of available funds for the costs of administration at the expense of the

State funds which are devoted to the payment of benefits, the actual purpose of the legislative program. This is contrary to the intention of Congress which regarded 90 per cent as the proper share to safeguard the funds for the payment of benefits.

Thus, although under the Illinois Supreme Court decision, the State would be entitled to have available funds first applied to its claim, we believe the most equitable arrangement is the **third** possible method of handling the offset: **Under this method the available funds would be allocated as follows: 10 per cent of the available funds to the Federal government, and 90 per cent to the State government,** the latter amount being offset against the Federal claim. This procedure is in keeping with the underlying purposes of the legislation. It gives consideration to the Federal government for the amount which is to be used for the administrative purposes, and to the State government in the maintenance of funds for the payment of unemployment benefits, and **the allocation is made in the proportion which Congress considered would give protection to both the costs of administration and the State funds from which benefits are to be paid.**

Using the same illustration with the government claim for $10,000, the State claim for $9,000, and the available funds of $5,000, the allocation of available funds would be as follows: 10 per cent of the available funds or $500 to the Federal government, and 90 per cent of the available funds or $4,500 to the State government.

It is to be noted that this last arrangement would **not** be in derogation of the Federal priority, since any amount which is paid to the State may be offset against the Federal claim and the Federal claim is correspondingly satisfied. Thus, in the above example, by means of the offset credit

the Federal claim is reduced and satisfied to the extent of $5,000, which is exactly the same amount that it would be reduced and satisfied if the full amount of cash were paid directly to the Federal government.

Such action does not "frustrate the government's priority under Section 3466." It is clear that Congress intended and actually preferred that up to 90 per cent of its claim for unemployment taxes be satisfied in this manner by payment to the State, and such payment is "satisfaction" of the Federal claim within the terms of Section 3466.

In view of these considerations we respectfully submit that insofar as Title IX (Federal unemployment) taxes are concerned, the Federal government's priority extends only to 10 per cent of the face of its claim (or 10 per cent of the funds available) because 90 per cent of its claim has already been "satisfied" within the meaning of R. S. 3466 by the assignee's payment to an approved State unemployment fund.

CONCLUSION.

For the reasons above stated, the State of Illinois, as *amicus curiae*, most respectfully prays that the judgment of the Circuit Court of Appeals in this case be reversed and the cause be remanded with appropriate directions.

Respectfully submitted,

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pp. 5, 7, 11, 19, 22

SUPREME COURT OF THE UNITED STATES

No. 157.—October Term, 1947.

Commonwealth of Massachusetts, et al., Petitioners, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 19, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case is for all practical purposes a renewal of the litigation recently here in *Illinois* v. *United States*, 328 U. S. 8, and the companion case of *Illinois* v. *Campbell*, 329 U. S. 362. The former unanimously held that the United States has priority, by virtue of Rev. Stat. § 3466, 31 U. S. C. § 191, for payment from an insolvent debtor's estate of federal insurance contribution taxes under Title 8 and unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat. 620, as against a state's claim for unemployment compensation taxes imposed by its statute conforming to the federal act's requirements. The *Campbell* case, which was reargued on other issues, rested on this ruling for disposition of the common issue concerning the effect of § 3466.

The facts are substantially identical with those in *Illinois* v. *United States*,[1] except in two respects. One is that

[1] Here, as in that case, the debtor made a common-law assignment for the benefit of creditors. The assignee here realized $1,135.11 from sale of the assets. The claim of the United States for Title 9 taxes amounted to $963.08; for Title 8 taxes, $690.05; and for capital stock taxes, $21. The commonwealth's claim was for $803.72 in unemployment taxes. Within the time allowed, but for intervention of the insolvency, the assignee paid the state's claim in full and then paid the remaining assets of $331.39 to the collector. He applied this sum on account of the Title 8 taxes, thus leaving unpaid the federal claims for capital stock and Title 9 taxes as well as $358.66 plus interest on the Title 8 claim.

the fund available here for distribution is more than sufficient to pay either the Title 8 or the Title 9 taxes, though inadequate to pay both, while in *Illinois* v. *United States* the fund was not large enough to satisfy either tax in full. Here too the debtor's assignee has paid to the commonwealth the full amount of its claim,[2] while in the *Illinois* cases the fund remained in the assignee's hands for distribution.

The District Court sustained the federal priority for capital stock and Title 8 taxes in full, and for 10 per cent of the Title 9 claim. It therefore deferred payment of any part of the state's claim until those claims were fully paid. But the court held the United States not entitled to priority for the remaining 90 per cent of the Title 9 claim, on the ground that Title 9, § 902,[3] gives the assignee "the alternative right" to pay that amount to an approved state unemployment fund. Accordingly the judgment ordered Massachusetts to pay over to the United States, from the $803.72 received from the assignee, sufficient funds to satisfy in full the federal priorities sustained, and to retain the small balance remaining after making those payments to apply on its claim for 90 per cent of the Title 9 taxes. 65 F. Supp. 763. This action was taken in the view that, while our previous decisions had sustained the federal priority for

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[2] The commonwealth in effect has undertaken to indemnify the assignee, by paying over to the United States the $803.72, if the payment to the state should turn out to have been erroneously made. The United States has agreed that if it prevails the judgment shall be limited to $803.72.

[3] The original § 902, 49 Stat. 639, provided that the taxpayer might credit against Title 9 taxes 90 per cent of his contributions under an approved state program. Subsequent amendments did not alter the conception of a basic 90 per cent credit. See, *e. g.*, notes 13, 15. The present "credit against tax" section is incorporated in the Internal Revenue Code, 26 U. S. C. § 1601.

the capital stock and Title 8 taxes, they had not determined the question for Title 9 claims.[4]

However, on appeal by both parties, the Circuit Court of Appeals held the United States entitled, under the *Illinois* rulings, to priority for the full amount of all its claims, including the Title 9 taxes. That court therefore affirmed the District Court's judgment except insofar as it denied the Government's Title 9 claim. As to this it reversed the District Court's ruling. 160 F. 2d 614.

Because of the obvious confusion concerning the effects of our prior decisions and the asserted differences between this case and the *Illinois* cases, certiorari was granted. 332 U. S. 754.

I.

Massachusetts seeks to retain the entire $803.72 she has received, in priority to all the federal claims. She agrees with the district court that § 902 gives the taxpayer an "optional right" of payment, but does not accept its allocation creating priorities for all federal claims except 90 per cent of the Title 9 taxes. To sustain this broad claim would require reversal of both of the *Illinois* decisions. In no other way, on the facts, could Massachusetts retain the whole amount she was paid.[5]

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[4] The District Court thought that in *Illinois* v. *United States*, the Title 9 issue had become moot either before or as of the time the case reached this Court, and that therefore we "had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States [by § 902] had not given the taxpayer the option to make payment to Illinois instead of to the United States." 65 F. Supp. 763, 765. The court thus regarded the Title 9 question as left open and "nicely analyzed . . . to be one not of priority but of alternative obligation." *Id.* at 764.

[5] Since the insolvent's assets are not large enough to pay either the Title 8 or the Title 9 claim and leave enough to pay the state claim in full. See note 1.

In the brief Massachusetts states the federal question as being whether the assignee may "make payment of the State unemployment

Illinois as *amicus curiae* takes a narrower position, conceding that the *Illinois* cases stand as decisive adjudications of priority for Title 8 taxes but disputing that effect for Title 9 claims.[6] This position seeks an allocation paying the state's claim after the Title 8 and other federal claims, including 10 per cent of the Title 9 taxes, but before or rather in "satisfaction" of the remaining 90 per cent of them.[7]

Notwithstanding their substantial differences, the two states rest their respective positions on the same basic arguments, which upon examination turn out to be identical with those vigorously presented by Illinois in the earlier cases, except for wording and detail. Much is made of the fact that here the debtor's assignee has paid to the commonwealth the full amount of its claim, while in *Illinois* v. *United States*, the fund remained in the assignee's hands. Both states urge that § 902 gives the taxpayer, and here his assignee, the "optional right" of payment to the state. Moreover, with respect to the requirement of Rev. Stat. § 3466 that "the debts due the United States shall be first satisfied," it is said that payment to the state with resulting credit to the United

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tax to the exclusion of the Federal Government claim for Title IX taxes *or any other taxes due the Federal Government* from the taxpayer?" (Emphasis added.)

[6] Illinois has appeared with leave, both by brief and in the oral argument. It neither expressly disclaims nor expressly supports Massachusetts' broad position for reversal.

[7] On the facts, see note 1, after paying the capital stock claim, the Title 8 claim and 10 per cent of the Title 9 claim, this would leave $327.75 to apply on the state's claim; and hence require Massachusetts to pay over to the United States $475.97 plus interest from the $803.72 she has received, in order to complete the payment in full of the Title 8 claim.

Actually this represents the District Court's specific allocation, not exactly that of either Massachusetts or Illinois. Each would apply a somewhat different method of allocation. See note 20.

States for 90 per cent of the Title 9 claim "satisfies" the Government's debt as much as payment to it in cash.

In the *Illinois* cases the foundation for the state's claim to be paid in preference to any of the federal claims lay in the credit provision of § 902, which is the identical provision for "optional payment." There was no question whatever that § 902 gave the taxpayer the "alternate right." But the precise issue in both cases was whether that right had been cut off by Rev. Stat. § 3466 when he became insolvent.

Obviously there could have been but little point or effect to our decisions if, despite them, the assignee could have turned around immediately and deprived the Government of the priorities established simply by exercising a right to make the optional payment to the state. Nor would the decisions have been much more sensible or effective, had they purported to sustain the federal priorities when the assignee has retained the fund, but to disallow them if he has paid the state before the federal claims are filed. We made no such ineffective or capricious rulings. The decision was broadly that by intervention of the insolvency and the consequent bringing of Rev. Stat. § 3466 into play, the taxpayer's right to pay the state and take federal credit had been cut off.[8]

Our decisions went to the merits of that right and not merely to rule that the state was not a proper party to enforce its exercise. The taxes due the United States were held to be debts; and by virtue of § 3466 the debtor's prior obligation attaching as of the date of his insolvency was to the Government, not to the state. It followed necessarily that the assignee could not "satisfy" it by paying the state and giving the Government "credit."

[8] See Part III. The federal priority under § 3466 attaches from the time the insolvent debtor transfers or loses control over his property. *Illinois* v. *Campbell*, 329 U. S. 362, 370; *United States* v. *Waddill Co.*, 323 U. S. 353, 355–358; *United States* v. *Oklahoma*, 261 U. S. 253, 260.

This was the very question at issue and the one adjudicated. The "alternate right" contention and the one that "satisfied" in § 3466 means "credit" are only verbal redressings of the basic issue decided in the *Illinois* cases.

II.

This is as true of the argument's bearing on Illinois' narrower position as it is for Massachusetts' broader one. But Illinois, apparently with Massachusetts' support, brings forward to sustain the less sweeping attack the additional contention that the *Illinois* decisions did not adjudicate Title 9 priority, although purporting to do so. Moreover, the facts present this narrower issue of distinguishing between Title 9 and other federal claims in sharper factual focus than did the *Illinois* cases. For if the capital stock and Title 8 claims are first paid in full, as the District Court required, a small balance of the fund will remain, to be applied either in part payment of the federal Title 9 claim or in some form of allocation between it and Massachusetts' claim. This was not true of *Illinois* v. *United States,* or indeed of *Illinois* v. *Campbell,* in the posture in which that case was brought here.

The principal argument is that the Title 9 taxes, though litigated in the Illinois courts, were not involved on the facts in the *Illinois* cases as they came to and were decided by this Court. Hence it is said we did not acquire jurisdiction over the Title 9 claims. The argument is correct concerning *Illinois* v. *Campbell.*[9] But it is surprising as

[9] The state supreme court's judgment had sustained the federal priority for Title 8 taxes, ordering them paid first and the small remaining balance of about $150 to be paid to the state. This left the Title 9 taxes unpaid. The court denied priority for that claim because it fell within the explicit exception of § 602 (b) of the Revenue Act of 1943. See text *infra* at notes 13, 14. The Government's failure to apply for certiorari as to the $150 eliminated the Title 9 issue from the case in this Court.

applied to *Illinois* v. *United States*, in view of the state supreme court's adverse decision on the Title 9 issue; Illinois' explicit application for certiorari on that issue and argument on the merits here to reverse it;[10] the necessity on the facts for the state to bring the question up and secure reversal in order to establish its claim;[11] and finally our opinion's clear and explicit terms, indeed emphasis, in deciding the Title 9 issue, together with the Title 8 one, against Illinois.[12]

the state court's decision;

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[10] Illinois almost uniformly put the issues as involving Title 8 and Title 9 taxes indiscriminately. Thus, in stating "The Questions Presented," the petition for certiorari spoke of priority for "Social Security excise taxes and Capital Stock taxes," necessarily encompassing Title 8 and Title 9 levies. This was repeatedly true of the state's brief. Further, the petition at one point said: "In holding that the claim of the petitioner was subordinate to the claims of the United States for capital stock tax and for taxes arising under Titles VIII and IX of the Social Security Act, the Supreme Court of Illinois looked to form, not substance, and disregarded the character and significance of petitioner's claim." The Government's briefs were equally positive in seeking disposition of the Title 9 claim.

[11] The federal claims asserted were as follows: Capital stock taxes, $58.73; Title 8 taxes, $1,065.52; Title 9 taxes, $1,284.36; all plus interest from the date due. The Illinois claim for state unemployment compensation contributions was $721.29. And the fund available to satisfy all these claims was $1,010.81.

Since the assets were insufficient to pay in full either the Title 8 or the Title 9 claim, Illinois had to override both to establish her claim. Illinois recognized this both by her application for review and by the broad argument that the state claim was tantamount to a federal tax and the credit provisions of § 902 exempted it completely from the priority of Rev. Stat. § 3466 for all federal taxes, not simply one.

[12] The opinion in *Illinois* v. *United States* explicitly stated: "The claim of the United States is for federal unemployment compensation taxes under Title 9 and federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620." 328 U. S. 8, 9. The opinion throughout treated Title 9 taxes on a parity with those under Title 8. We accepted fully the state's view that

The idea that the state court decided only the Title 8 issue completely misconceives its action, and serves only to confuse the judgment in that case with the one in *Illinois* v. *Campbell*. Indeed it seeks to infuse into the former the latter's denial of Title 9 priority. Not only is this wholly incompatible with Illinois' earlier position; it ignores the fact that the state court disposed of the Title 9 issue in both cases, but in opposite ways on entirely different facts and legal issues.

In *Illinois* v. *Campbell*, the state court did not reach the basic question of the force of Rev. Stat. § 3466 to create priority for federal Title 9 claims; rather, it expressly avoided deciding that question. 391 Ill. 29, 32. This was because the insolvent's assets were in the hands of a court-appointed receiver, *id.* 31, and in that situation § 602 (b) of the Revenue Act of 1943, 58 Stat. 77,[13] expressly allowed the receiver to pay the state and

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the credit or "optional payment" provision of § 902 was designed to stimulate the creation of sound state systems. 328 U. S. 8, 10. See *Illinois* v. *Campbell*, 329 U. S. 362, 367, n. 5. But we rejected the argument that the state claim was tantamount to a federal one and said: "But we cannot agree that Congress thereby intended in effect to amend § 3466, by making its priority provisions inapplicable to state unemployment tax claims." 328 U. S. 8, 11. The ruling applied to both types of tax without distinction.

[13] This section was one of the relaxing amendments, see Part IV, to Title 9, § 902, of the Social Security Act. For Title 9 taxes due for the years 1939, 1940, 1941 and 1942 it allowed credit up to 90 per cent, without regard to previous failure to pay as required, if the assets of the debtor had been, during the period specified, "in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction."

Section 602 (a) of the 1943 Act, 58 Stat. 77, also created a similar relaxation of § 902, for Title 9 taxes due for the years 1936, 1937 and 1938, with credit limited however to 81 per cent, when the state payments for those years were made after December 6, 1940. This section formed the basis for a claim to credit in *Illinois* v. *United States* rejected by the Illinois court. See note 15.

take credit up to 90 per cent of the Title 9 tax. The Illinois Supreme Court expressly so held, and on this ground alone denied the federal Title 9 claim. 391 Ill. 29, 34. The effect was to rule that § 602 (b) created a legislative exception to § 3466, limited to payments by such receivers, within the times and for the tax periods specified, up to 90 per cent of the Title 9 taxes.[14]

But § 602 (b) did not apply in *Illinois* v. *United States*, because the insolvent's assets were held by a common-law assignee, not a court-appointed official.[15] So holding, 391 Ill. at 37, the Illinois court went on to rule that the federal claims for Title 8 and Title 9 taxes were debts within the meaning of § 3466 and were therefore entitled to priority over the state's claim. It not only rejected

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[14] See also Part IV. The court, however, in giving directions for the decree to be entered by the trial court ordered the federal Title 8 claim paid first in full "and any balance remaining" to the state. 391 Ill. at 46; see also *id.* 42. Thus apparently it inadvertently lost sight of the fact, earlier expressly noted, *id.* 34, 39, that § 602 (b) allowed the receiver to take credit only up to 90 per cent of the Title 9 taxes.

This oversight seemingly was responsible for the court's failure to award priority to the United States for 10 per cent of its Title 9 claim, from the small balance remaining after paying the Title 8 taxes. Cf. note 9. Had this amount, some $128, also been awarded to the United States, roughly only $22 would have been left for the state. The opinion gave no consideration to this question, and by the Government's failure to apply for certiorari regarding it we were prevented from considering it.

[15] An additional reason was that the taxes against which credit was claimed were not taxes for the years to which § 602 (b) expressly limited the credit it allowed. Instead § 602 (a) of the 1943 Act, see note 13, allowed conditional credit for the tax years involved in *Illinois* v. *United States* and the state sought to secure it. But the Illinois court held § 602 (a) also inapplicable on the facts and denied the 81 per cent credit because the assets were in the hands of a common-law assignee, not in the custody or control of a court-appointed receiver or other official as the section required for the credit to be available. 391 Ill. at 37.

the argument that the credit provision of Title 9, § 902, made that claim "in reality a claim of the Nation . . . tantamount to a claim of the United States,"[16] but also carefully guarded the wording of the opinion's dispositive paragraphs[17] and the directions given the trial court for entering the judgments on remand so as to differentiate the two cases and to avoid any direction that the fund in *Illinois* v. *United States* apply on only one of the federal claims.[18] The judgment thus left the United States free to apply it in partial satisfaction of either claim or both.

This was also the effect of our own decision and judgment. It generally and without distinction between the Title 8 and Title 9 claims adjudicated priority for both. As in the Illinois court's decision, no restriction was placed upon allocation of the fund, nor is any hint to be found in the opinion that such an allocation was intended. Indeed we were not asked to make one and to have done so would have disregarded the basic position of both parties, each of which sought a full and favorable dis-

[16] 391 Ill. at 39, 40; cf. 328 U. S. at 11. The Illinois court held "the full amount" of the payroll (Title 9) taxes to be "taxes due the Federal government." In the first instance, it said, this was true of "100 per cent of the taxes levied," which "continues to be taxes due the Federal government either until it is all paid to the Federal government, or 90 per cent is paid to the State and the balance to the Federal government." The provisions for credit, the opinion continued, "do not change the character of the taxes imposed. They are still taxes due the Federal government and constitute a debt due to the United States within the purview of section 3466 of the Revised Statutes." *Id.* 40, 41.

[17] 391 Ill. 42, 46.

[18] *Ibid.* The order for judgment in *Illinois* v. *United States* merely reversed the trial court's judgment and remanded the cause "with directions to enter a decree finding that the United States is entitled to priority of payment to the extent of the funds on deposit, and ordering distribution accordingly." 391 Ill. at 46. See note 14 for the directions in the *Campbell* case.

position of the controversy including decision upon all the issues presented.[19]

It is true that, as in the Illinois Supreme Court, the decision and judgment could have been made on the narrower basis that the Title 8 claim was more than sufficient to exhaust the fund, and therefore to sustain the priority for that claim alone would dispose of the case. But this would have been equally true of the Title 9 claim. Neither claim was either more or less essential to decision than the other, indeed decision upon both was necessary to a judgment favorable to Illinois. To have eliminated either would have required some indication of that purpose. Since none was given, it cannot be said that the judgment rested on the one ground or claim more than the other.

While therefore the case is one which might have been decided on either of two independent grounds favorably to the Government, it is neither one in which that course was followed nor one which could have been determined the opposite way in that manner. Instead, as we were asked to do and rightly could do on the record and the issues, we decided both issues, and the judgment rested as much upon the one determination as the other. In such a case the adjudication is effective for both. *United States* v. *Title Ins. Co.*, 265 U. S. 472; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160; see *Richmond Co.* v. *United States*, 275 U. S. 331, 340.

III.

Finally, it is urged that in *Illinois* v. *United States* we had no occasion to consider and hence our opinion did not

[19] See notes 10, 11. The cases were obviously test cases designed to settle the question of priority generally, *i. e.*, not merely for one but for all federal taxes and thus provide a certain basis for administration of the Social Security Act in both its insurance and unemployment compensation features.

discuss whether in a case like this, where the fund is more than sufficient to pay all federal claims except 100 per cent of the Title 9 claim, the balance remaining after paying those other claims must go first to pay the federal Title 9 claim in full, or may be allocated between that claim and the state claim to pay 10 per cent of the federal claim first and then to apply what remains on the state claim.[20]

Closely related to this, though not involved on the facts in *Illinois* v. *United States* or here,[21] is the Government's apparent concession that if all the federal claims are paid in full, including 100 per cent of the Title 9 claim, and any balance then remains in the fund, the insolvent taxpayer is nevertheless given the right by § 902 to pay that balance to the state and receive credit on his federal Title 9 tax. In such a case, it is said, the Government would be overpaid on Title 9 taxes and obligated to refund the excess. Then the taxpayer could apply the amount received in further payment of the state claim, with corresponding federal credit, overpayment and refund, only to start the cycle again and repeat it until he had paid the state its claim in full and received the entire 90 per cent credit.[22] Hence in this situation, it

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[20] Cf. the District Court's view, note 4 *supra;* and note 7. Illinois and Massachusetts in fact urge different methods of allocation, each differing from the one applied by the District Court. From the funds available for Title 9 distribution, Massachusetts would pay the state claim first and correspondingly reduce the federal claim. Illinois would make a *pro rata* distribution of 10 per cent of the available funds to the Federal Government and 90 per cent to the state, while the District Court would pay the federal 10 per cent first and apply the balance remaining on the state claim.

[21] Since the fund was not large enough in either case to pay all the federal claims in full.

[22] Hypothetical examples are stated in the District Court's opinion, 65 F. Supp. 763, and in the briefs filed here.

is said, short-cut distribution might well be made to the state in the first place, to eliminate the cycle.

The effect of the concession, if it is valid, goes far toward cutting the ground from beneath the Government's basic position.[23] That effect is heightened by the further surprising statement in its brief that in a case like this, not covered by the concession, compliance with the credit conditions of § 902 becomes impossible "not because Section 3466 operates to exclude Section 902 or to nullify it, but because the terms of Section 902 itself deny it [credit] where no payment can be made." The statement would be understandable, if it had been that § 3466 and § 902 both work to deny the credit in this situation. But to say that § 3466 has no effect to cut off the right to credit either in the present situation or in the different hypothetical one stated is to take away the basic grounding of all federal priority as against the state's claim.

The concessions cannot be accepted. In the first place, the effect of § 3466 depends on the fact of insolvency, not on the degree of it as the first concession seems to contemplate. And it is only by force of § 3466 that the Government has any priority at all. Section 902 may work to deny credit, if its conditions for credit are not fulfilled. But it does not give federal priority over valid state claims. Moreover, both concessions are altogether inconsistent with the basic decisions in the *Illinois* cases and the grounds on which they rested. The matter requires brief restatement. It is one which goes funda-

[23] Possibly the concession was intended as an argumentative alternative to other and broader positions. In any event, we are not bound to accept it as either sound or conclusive of the litigation. It is not, even in terms, a confession of error.

These observations apply equally to the Government's further damaging statement set forth in the sentence following the one to which this footnote is appended.

mentally to the effect of Rev. Stat. § 3466, as distinguished from, though not unrelated to, § 902 of the Social Security Act. These of course are entirely distinct statutes, with different functions.

Rev. Stat. § 3466 gives priority explicitly for "*debts* due to the United States" and the priority given is in terms absolute, not conditional. Once attaching, it is final and conclusive. A long line of decisions has held that taxes due the Government are "debts" within the meaning of the section.[24] In the *Illinois* cases we applied this ruling to Title 8 and Title 9 taxes as against the state's claim for "contributions." Prior decisions also have held that

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[24] The federal priority has been uniformly sustained for tax claims. *United States* v. *Waddill Co.*, 323 U. S. 353 (unemployment compensation taxes and a debt arising out of a Federal Housing Administration transaction); *United States* v. *Texas*, 314 U. S. 480 (gasoline taxes); *New York* v. *Maclay*, 288 U. S. 290 (income taxes and a claim for expenses incurred in the replacement of a buoy damaged by the insolvent); *Spokane County* v. *United States*, 279 U. S. 80 (income taxes and penalties); *Price* v. *United States*, 269 U. S. 492 (income taxes and customs duties); *Stripe* v. *United States*, 269 U. S. 503 (income, excess profits, and capital stock taxes).

Judgments recovered by the United States also are debts entitled to priority. *United States* v. *Knott*, 298 U. S. 544 (against surety on estreated bail bonds); *Hunter* v. *United States*, 5 Pet. 173 (against surety).

Other debts for which the Government has been held to have priority under § 3466 are: *United States* v. *Remund*, 330 U. S. 539 (emergency loans made by Farm Credit Administration); *United States* v. *Emory*, 314 U. S. 423 (sum due on note held under the National Housing Act); *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483 (Indian funds deposited in bank); *United States* v. *National Surety Co.*, 254 U. S. 73 (losses where contractor defaulted); *Bayne* v. *United States*, 93 U. S. 642 (misappropriated Army paymaster funds); *Lewis* v. *United States*, 92 U. S. 618 (funds held by Navy disbursing agents); *United States* v. *State Bank of North Carolina*, 6 Pet. 29 (bonds for customs duties); *United States* v. *Fisher*, 2 Cranch 358 (claim against endorser of protested bill of exchange).

the priority attaches as of the time of the insolvency,[25] a ruling also applied in the *Illinois* cases.

But if credit can be taken after § 3466 attaches, *i. e.*, after insolvency, effective to set aside the federal priority up to 90 per cent of the Title 9 claim, the priority to that extent becomes conditional, not absolute. Its effectiveness then becomes contingent upon the happening of subsequent events, namely, the concurrence of the conditions of § 902 for paying the state and taking the credit together with the taxpayer's election to do this. In short, § 3466 never conclusively attached and § 902 works retroactively on occurrence of those contingencies to upset the priority.

A further effect might be to make the statute applicable beyond the scope of the term "debts due to the United States." For if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the "debt" itself becomes contingent. And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of "debts due" as of the time of insolvency.[26]

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[25] See note 8 *supra*.

[26] It has been held that the term "debts due to the United States" should be construed with some liberality. See, *e. g.*, *Price* v. *United States*, 269 U. S. 492, 500; *United States* v. *Emory*, 314 U. S. 423, 426. And there is apparently no decision expressly ruling the matters of contingency of the obligation or of the priority upon subsequent events not certain. Cf. *United States* v. *Marzen*, 307 U. S. 200. But the fact that the problem has not squarely arisen in the long history of § 3466 and that all of the decisions sustaining the priority were for debts clearly due and owing, adds force to the clear inferences implicit in the statute's wording, *viz.*, that Congress not only created a conclusive priority attaching as of the time of insolvency but in doing so drew the line for its operation close to, if not at, the commonly accepted meaning of "debt" as distinguished from other forms of obligation.

However this may be, we know of no previous application of § 3466 creating such a conditional priority.[27] Nor do we see how one could be made consistently with the section's terms or purposes. The only such consistent application would seem to be one giving the Government the prior and indefeasible right to take the fund available, up to the amount necessary to pay its claim as of the date the priority attaches, not as it may be affected by later contingencies other than payment.[28] In enacting § 3466 Congress gave no indication whatever of intent to create defeasible priorities.

The defeasance conceded possible by the Government, therefore, together with the further conceded ineffectiveness of § 3466 [though not of § 902] in circumstances like these to deny the right to credit, destroys the fundamental character of the priority created by § 3466 and thereby removes the foundation from the Government's basic position, which is that § 3466 applies as of the time of insolvency to create the priority it contemplates. Through these concessions the section is made, by virtue of the effect of § 902, to create only a defeasible federal priority as against claims for credit. This actually is but another way of making § 902 effective as an exception to Rev. Stat. § 3466, like § 602 (a) and (b) of the Revenue Act of 1943, noted above in Part II.

This of course was Illinois' earlier position, rejected by this Court. If that position is now to be accepted, we do not see how § 3466 can be regarded as applying to Title 9 taxes or, indeed, how the effect of treating § 902 as an exception can be limited to Title 9 taxes.

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[27] See notes 24, 26.

[28] Again the distinction between "payment" and "satisfaction" becomes pertinent. To construe the term "satisfied" in § 3466 as being fulfilled by taking subsequent credit, as the states urge, would be to qualify the word "debts" so as to make it include conditional obligations.

For if § 902 works as an exception to § 3466, then Illinois was right in the first place, and the exception would seem to apply to all federal taxes, not just the one.[29]

Accordingly, the Government's concessions cannot be accepted as consistent either with our prior decisions or with its own basic position in the *Illinois* cases and this one. That position, apart from the concessions, rests ultimately on § 3466 and its applicability to these claims. This necessarily denies that § 902 creates an exception to § 3466 or a qualification inconsistent with its terms. The qualifications now conceded are not consistent with those terms, for they do not contemplate the tenuous, destructible sort of "priority" the concessions involve.

Moreover, the fact that in *Illinois* v. *United States* we did not discuss expressly the 10–90 per cent distribution of Title 9 taxes now suggested does not mean that our decision did not encompass that possibility. It extended generally to all cases where credit is sought after insolvency. It was federal *priority* attaching as of the time of insolvency that we adjudicated, not something less. As we have indicated, in making the adjudication we neither were nor could have been ignorant of § 902's allowance of the taxpayer's election. Our decision held that right cut off by the incidence of § 3466 at the time of insolvency. Any other would have been wholly incon-

[29] Congress, of course, could provide for federal priority as to all taxes except Title 9 claims. But, apart from the explicit exceptions created by § 602 (a) and (b) of the Revenue Act of 1943 with reference to funds of insolvents in the hands of court-appointed officials, see Part II, notes 13, 15, Congress has not done so either by any wording or intent of Rev. Stat. § 3466, nor in our view by § 902 of the Social Security Act. We do not think that it intended to make the state's claim subject to all other federal taxes, but prior to all but 10 per cent of the Title 9 taxes. See text *infra* Part IV. No instance has been found where § 3466 has been applied to create such a selective priority as among federal claims qualifying as "debts" within the meaning of § 3466.

sistent with the ruling that § 3466 applies as against the state's claim for "contributions" or the taxpayer's right to make them after the incidence of his insolvency.

IV.

We have taken pains to state the effect of our previous decisions, because of the confusion concerning them and the fact that two states have earnestly presented the questions. Ordinarily this would end the matter. But, again for those reasons, we turn briefly to the merits and to the question whether the *Illinois* decisions should now be reversed.

Apart from the arguments already discussed, two stand out as reasons for the change sought. Both reiterate contentions rejected in the *Illinois* cases. The primary one is that the objects of the legislation will be defeated unless the change is made, namely, the encouragement of the state systems and correspondingly of taxpayers to make "contributions" to state funds, thereby insuring that the moneys so paid in will go out for unemployment benefits rather than into the Treasury as revenue. The second is a heightened emphasis on the subsequent amendments to § 902 as showing Congress' intent to waive, in progressively broadening scope though still only in specified situations, the original limitations of § 902 upon securing credit.[30]

From the second contention is drawn the conclusion that Congress, by its carefully, even meticulously drawn relaxations, meant credit to be given not only in the circumstances so carefully prescribed but also in other situations not within those prescriptions. This conclu-

[30] Of the several amendments, none is applicable to this case. The only ones relating expressly to insolvents' estates are those noted in Part II, see notes 13, 15 and text, 31, applying to payments by court-appointed receivers, etc.

sion when added to the first argument amounts in sum to reiterating that the state exaction is "tantamount to a claim of the United States," and that not to disregard the tax and credit structure in which Congress molded the Act would be to "observe the form and ignore the substance of the legislation."

We shall not repeat the answers made in *Illinois* v. *United States*, except to say that "while the state and federal governments were to cooperate, the underlying philosophy of the Federal Act was to keep the state and federal systems separately administered." 328 U. S. 8, 11. To the considerations there stated, however, we now add the following ones, not expressly mentioned in the earlier opinion, prefaced however with the observation that the grounding of each plea for reversal affords basis for conclusion against that action as well as in its favor.

Thus the many relaxations which Congress has made respecting the conditions permitted for taking credit, by force of their very number and careful limitation, show that Congress was not offering a broadside exemption to be applied in situations, such as this case, other than those specifically defined.[31] Rather the intention disclosed is to limit the credit to the precise situations specified for allowing it. That view accords with Congress' deliberate choice of the tax and conditional credit devices for fram-

[31] Thus, as has been noted, the provision for payment and credit given by the Revenue Act of 1943, §§ 602 (a) (3) and (b), 58 Stat. 77, is limited to situations where an insolvent's assets were under the control of a court or its appointed official, ~~not where they were in the hands of a common-law assignee.~~ Congress quite obviously had the insolvent taxpayer in mind. But even so it excluded nonjudicial custodians of his assets by its failure to extend the relaxation to them. The omission cannot be taken to have been unintentional. The necessary effect in the one case was to create a legislative exception to § 3466, in the other to deny it by the withholding of the like privilege. So also with the other easing amendments.

ing the Act's structure. These are well-known techniques, adopted apparently in this instance for constitutional as well as administrative reasons.[32] But those very motivations warn us to be wary of disregarding the form which Congress has chosen advisedly, in order to substitute a substance we can only be doubtful it may have intended.[33]

But it is said that if payment to the state is not allowed and the right to receive credit is cut off, the money will not be paid out in unemployment benefits but will go into the Treasury as general revenue; the states will be compelled to make payments to the insolvent's employees; and thus the primary purposes of the Act will be defeated. There are several answers.

One is that Congress has guaranteed the solvency of the state funds and, if need be, the revenues thus paid into the Treasury will be available for that purpose.[34] Moreover, but especially in view of this guaranty, it

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[32] Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

[33] It is precisely in matters where Congress has used the tax and credit technique that disregarding the form chosen offers the gravest dangers of perverting a statute's purposes. We think that possibility is equally as great here from ignoring Congress' expressed intent, both in limiting the right of credit to defined situations and in its failure expressly to qualify the broad policy of § 3466, as would be the other one of reaching its purpose by giving effect to its explicit limitations.

[34] Sections 904 and 1201 of the Social Security Act, 58 Stat. 789, 50 U. S. C. App. Supp. V, §§ 1666–1667, as amended, Pub. L. No. 379, 80th Cong., 1st Sess., §§ 4–5. Section 904 established a federal employment account in the United States Treasury, and appropriated the excess of Title 9 taxes over unemployment administrative expenses to such account. Section 1201 authorized loans from such account to the states for unemployment insurance payments when a state's unemployment insurance fund becomes dangerously low, repayment of such advances not being required unless the state fund regains stable condition. See S. Rep. No. 477, 80th Cong., 1st Sess. 9–10.

may be more likely that the funds, if paid into the Treasury rather than to the state, will be saved for application to the Act's purposes. For there is no assurance, if the state's prior right to them is once established, that they will go for the payment of unemployment benefits.

It must be remembered that we are dealing with an insolvent's assets. And the states have statutes by which such assets are distributed according to local priorities whenever § 3466 is not operative. Only a few of them place unemployment benefits at the top.[35] Depending therefore upon the number and the amounts of claims standing ahead of the unemployment benefit claims in the particular state would be the certainty or probability of payment of the latter. In short, reversing our decisions and conceding the validity of the state's position, either as to Title 9 taxes alone or as to all federal taxes, would give no definite and certain assurance that the funds thus acquired by the states would go to satisfy the Act's purposes.[36] In many cases payment to the state would be the means of diverting them to wholly extraneous objects. Especially would this be true when smaller employers within the Act's terms are involved, as they seem to be much more often than others.[37] In the absence

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[35] See, *e. g.*, Mass. Ann. Laws, c. 151A, § 17 (1942); Cal. Gen. Laws, Act 8780d, § 46 (1944); Iowa Code, § 96.14 (3) (1946); Okla. Stat., tit. 40, § 224 (c) (1941).

[36] Unless in this case we should undertake to say, as we have not been asked or authorized to do, that by implied force of § 902, state priorities are relegated to a position inferior to the taxpayer's right to pay the state and take federal credit. Nothing in the statute suggests that Congress intended to give the taxpayer or this Court the power thus to disorder the states' schemes of priorities.

[37] If the litigated cases, of which the ones that have come here seem to be typical, and common observation may be taken as fairly accurate bases for judgment.

It is true that in some cases of insolvency the business continues without being wound up. But this perhaps is much more often the

of any explicit or implied direction we do not believe that Congress intended to require that the state's claim for unemployment contributions take precedence over all other debts of the insolvent or to authorize us to make this a condition of allowing payment to the state to be made from his estate. There was no evident purpose thus broadly to upset state schemes of priority.

These examples are enough to show that the premises of the states' contentions are capable of supporting other conclusions than they draw from them. Other examples might be stated. But in each instance the inferences drawn by the states are counterbalanced with opposing ones quite or nearly as tenable. In some they are of greater weight.

It follows that Massachusetts and Illinois have not shown the clear inconsistency between the Act's explicit terms and our previous decisions, on the one hand, and achieving the Act's purposes, on the other, which is necessary to make out a case for reversal and thus for negating the force of Rev. Stat. § 3466 as creating federal priorities for Title 9 or other federal tax claims. The *Illinois* decisions were advisedly made, after full deliberation. There was no dissent on the basic question of priority, even though the issue seemed close. No substantially new argument or consideration of policy has been put forward. The case for reversal is no more clear or convincing than Illinois' position on the merits in the earlier litigation.

Nor are we persuaded that our former decisions were erroneous. For the strict policy of § 3466 had permitted

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case when operation is continued under judicial control than otherwise. And when that is the situation, insofar as the 1943 amendment applies the payment may be made and credit obtained. Insofar as it does not apply the amendment is a clear mandate against allowing that to be done.

few exceptions[20] and, as we repeated in *Illinois* v. *United States*, quoting *United States* v. *Emory*, 314 U. S. 423, 433, "only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." 328 U. S. 8, 12. See also *United States* v. *Remund*, 330 U. S. 539, 544. There is no such inconsistency here.

Until the federal claims for taxes, whether under Title 8, Title 9 or other taxing provision are paid in full, the states are not entitled either to collect or to retain any part of the insolvent's debtor's assets. We do not anticipate that any of the state unemployment insurance programs will fail or be seriously impaired by reason of this decision, or their consequent failure to secure the small sums characteristically at stake in this extended litigation and, apparently, in other cases most likely to produce similar controversy. Nor would the Federal Treasury have been rendered bankrupt by a contrary result.

The judgment of the Circuit Court of Appeals is

Affirmed.

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[20] The original departures indeed did not contemplate that exceptions were being made. They conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor. *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611; see *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428; cf. *United States* v. *Fisher*, 2 Cranch 358; *United States* v. *Hooe*, 3 Cranch 73. The Court has been loath to expand these exceptions, cf. *Illinois* v. *Campbell*, 329 U. S. 362, 370, to include other types of lien. The claims of Massachusetts and Illinois do not fall within the scope of those exceptions or of others as to which the Court has felt that subsequent legislation authorized them. Cf. *Cook County National Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478.

SUPREME COURT OF THE UNITED STATES

No. 157.—October Term, 1947.

Commonwealth of Massachusetts, et al., Petitioners, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 19, 1948.]

Mr. Justice Jackson, with whom Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Burton join, dissenting.

This decision announces an unnecessarily ruthless interpretation of a statute that at its best is an arbitrary one. The statute by which the Federal Government gives its own claims against an insolvent priority over claims in favor of a state government must be applied by courts, not because federal claims are more meritorious or equitable, but only because that Government has more power. But the priority statute is an assertion of federal supremacy as against any contrary state policy. It is not a limitation on the Federal Government itself, not an assertion that the priority policy shall prevail over all other federal policies. Its generalities should not lightly be construed to frustrate a specific policy embodied in a later federal statute.

The Federal Government has sued to enforce a personal liability against one who, as assignee, paid to the State of Massachusetts funds which the Federal Government claims by virtue of its statutory priority. Defendant was the assignee of a small concern under a common-law assignment for benefit of creditors. The assets did not

realize enough to pay both federal and state tax claims. The United States filed a claim, among other things, for 100% of the taxes laid by Title 9 of the Social Security Act, which however, provides for a 90% credit against the federal tax if that amount has been paid into an approved state unemployment compensation fund. Believing that he was entitled thereby to pay the State and to claim the credit against the federal tax, this assignee paid $803.72 on the claim of Massachusetts for taxes under the Massachusetts Unemployment Compensation Act. This is the sum now demanded by the Federal Government.

The reasoning on which the assignee is held liable and the State is required to turn this amount over to the Federal Government is this: True § 902 gives a 90% credit. But, literally, it is only for actual payment to the State. On insolvency, the federal priority statute, so it is held, intervenes and freezes the funds in the assignee's hands so that he cannot pay the State until he has first paid the Federal Government. Hence, unless he has enough money to pay both claims in full, the priority statute prevents him from taking the credit which the Social Security Act grants him, the Federal Government collects a windfall ten times what would normally be its due, and the State government gets nothing on its tax claim. This Court now so construes the priority statute as not merely to prefer net claims of the Federal Government, but also as a prohibition against courts marshaling the assets of an insolvent in an equitable manner.

The District Judge declined to support this harsh reasoning. He is one whose views of the meaning of the Social Security Act are entitled to great weight, because of his experience with it. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, at 553. He considered that as to 90% of the federal tax, the taxpayer in effect was given an option to pay it to the approved state fund or to the Federal Government. He said:

"The force of that analysis seemed to me the more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548, was stressed. As to 90 per cent of the taxes under that title the objective of Congress was not to collect federal revenues but to stimulate the creation of and payment to state unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under state unemployment compensation plans."

The consequences of this Court's refusal to follow his reasoning are so inconsistent with the purposes of the Social Security Act that they could not have been intended by a reasonable Congress. What the Court is doing practically is this:

1. The Court is giving the Federal Treasury a payment from an insolvent taxpayer ten times as large as Congress exacted from a solvent taxpayer under like circumstances. The 90% was never contemplated as federal revenue, but credit for that amount was intended to be availed of, to induce states to create unemployment compensation funds and to maintain them in solvent condition.

2. The Court is depriving the State of a revenue Congress not only tried to assure it, but one which it used the tax and credit device to impel the state to collect. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

3. This unjust enrichment of the Federal Government and the depletion of state unemployment funds is accomplished by holding that the priority statute prohibits simultaneous distribution to each, State and Federal Government, of the net amount actually due, taking into account such simultaneous payments, and by requiring instead that the total federal tax be paid in full and first in point of time, which in this case depletes the estate so

that the assignee cannot thereafter make the state payment to obtain the federal credit. It seems to me that the federal priority statute cannot have been intended to do more than secure to the Federal Government what becomes fairly due it on a marshaling of assets as courts of equity usually do.

4. This interpretation prejudices general creditors by placing ahead of them $190 of tax claims for every $100 actually owing. For example, the maximum tax for both the State and Federal Governments is that laid by the Federal Act—let us say it amounts to $1,000. It can be discharged by payment of $1,000, $900 paid to the approved state fund and $100 to the Federal Government. But under this ruling the insolvent must pay the $1,000 in full to the Federal Government. That, of course, leaves the state tax undischarged, which calls for payment of another $900 before anything can be left for the general creditors. Thus, where an equitable marshaling of assets to pay just claims would put $1,000 of taxes ahead of general creditors, the Court's ruling puts $1,900 ahead of general creditors. The Court even goes so far as to reject concessions by the Government designed to mitigate, in this respect at least, the harshness of this rule.

The interpretation of the Priority Act to thus gouge the states and private creditors is contrary to the purpose and spirit of the Act itself. Over a century ago Mr. Justice Story defined the "motives of public policy" which underlie the priority statutes of the Federal Government to be "in order to secure an adequate revenue to sustain the public burthens and discharge the public debts. . . ." *United States* v. *State Bank of North Carolina* (1832), 6 Pet. 29, 35. It is obvious that as to the 90% of the Social Security tax here involved, it was not contemplated as federal revenue to meet federal burdens but was laid to induce and to enable the State to assume specific obligations to the unemployed. The priority

statute is now invoked to deny, in this class of cases, the aid promised in meeting these obligations.

When a later statute has enacted a comprehensive federal policy in another field and created a federal interest in the adverse claimant's solvency or function, this Court has rarely, and never until recently, hesitated to interpret the old and general priority statute as yielding to the newer and specific statutory scheme. *Cook County National Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; *cf. Callahan* v. *United States*, 285 U. S. 515. See also dissent in *United States* v. *Emory*, 314 U. S. 423 at 433. The problem here is not whether a mere state claim can defeat one of the Federal Government, but whether one federal statute will be so construed as to defeat the manifest policy of another.

The Court's opinion, however, goes to some lengths to show that the Court as a whole and without dissent on this point has become committed to the interpretation it adopts, and by unusual deference to the doctrine of *stare decisis* declares itself bound hand and foot to full federal priority. I am unable to detect the commitment which the Court so clearly sees. But if I have agreed to any prior decision which forecloses what now seems to be a sensible construction of this Act, I must frankly admit that I was unaware of it. However, no rights have vested and no prejudicial action has been taken in reliance upon such a ruling. It does not appear to have been called to the attention of Congress and in effect approved by failure to act. Under these circumstances, except for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.

I would reverse the judgment and allow federal priority only subject to the 90% credit for sums disbursed to the State on account of its unemployment compensation tax.